Supreme Court, U.S.
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011515 APR 10 2002

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No. ____

In the Supreme Court of the United States

CITY OF DETROIT, MICHIGAN, ET AL.,
Petitioners,

v.

LAC VIEUX DESERT BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Should a First Amendment challenge to an ordinance giving a limited preference in public contracting decisions be tested by strict scrutiny where this Court has held that public contracting decisions allegedly made on the basis of political speech are subject at most to a deferential balancing test?

II. Did the City's legitimate interests furthered by the preference outweigh the free speech interests allegedly at stake, where the preference was just one factor among many, its purpose was not to suppress speech, it had a minimal effect on speech, and it did not cause injury to Respondent?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The Petitioners are the City of Detroit, Michigan, Dennis Archer, Mary Ann Mahaffey, Gil Hill, Clyde Cleveland, Sheila Cockrel, Brenda M. Scott, Nicholas Hood III, Alberta Tinsley-Williams, Mel Ravitz, Kay Everett, Atwater Entertainment Associates, L.L.C. and Greektown Casino, L.L.C. The parties to the Court of Appeals proceeding in which the judgment sought to be reviewed was entered were the Petitioners and Lac Vieux Desert Band of Lake Superior Chippewa Indians.

Greektown Casino, L.L.C., is a limited liability company comprised of Monroe Partners, L.L.C. ("Monroe") and Kewadin Greektown Casino, L.L.C., ("Kewadin"), each of which has a 50% interest. Monroe is owned by the Sault Ste. Marie Tribe of Chippewa Indians ("Tribe"), which has an 80% interest, and a variety of other owners, none of which is a publicly held corporation. Kewadin is owned entirely by the Kewadin Casinos Gaming Authority, which in turn is owned entirely by the Tribe.

Atwater Entertainment Associates, L.L.C., ("Atwater") has no parent corporation and no publicly held corporation has any interest in it. Atwater is a member of Atwater Casino Group L.L.C. Its other member is ZRX, L.L.C., which is not a publicly held corporation. Atwater Casino Group, L.L.C., is a member of Detroit Entertainment, L.L.C., which holds the casino license. The other member of Detroit Entertainment, L.L.C., is Circus, Circus Michigan, Inc., which is a wholly owned subsidiary of Mandalay Resort Group, which is a publicly held entity.

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The opinions of the Court of Appeals for the Sixth Circuit are reported at 276 F.3d 876 (6th Cir. 2002) and 172 F.3d 397 (6th Cir. 1999) and are reproduced at Petitioners' Appendix ("Pet. Apx.") 1a-15a; 16a-43a, respectively.

The unreported October 31, 1997 opinion of the United States District Court for the Western District of Michigan granting Petitioners' motions for summary judgment and denying Respondent's motion for summary judgment is reproduced at Pet. Apx. 44a-89a.

The unreported October 31, 1997 Order and Judgment of the United States District Court for the Western District of Michigan is reproduced at Pet. Apx. 90a-92a.

The unreported July 14, 2000 Order of the United States District Court for the Western District of Michigan is reproduced at Pet. Apx. 121a-122a.

The unreported July 14, 2000 opinion of the United States District Court for the Western District of Michigan granting Petitioners' motions for summary judgment and denying Respondent's motion for partial summary judgment is reproduced at Pet. Apx. 123a-139a.

The unreported February 7, 2002 Order of the United States District Court for the Western District of Michigan after remand granting Plaintiff's motion for partial summary judgment and declaring the ordinance unconstitutional is reproduced at Pet. Apx. 140a-141a.

The unreported March 2, 2002 Order to Show Cause of the United States District Court for the Western District of

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit in this case.

JURISDICTION

The Court of Appeals for the Sixth Circuit entered its judgment on January 11, 2002. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS/STATUTES INVOLVED

This case involves U.S. Const. Amend. I ("Congress shall make no law . . . abridging the freedom of speech[.]") and Detroit Casino Development Competitive Selection Process Ordinance, Detroit City Code § 18-13-1, *et seq.* as amended by Detroit City Ordinance 46-98. The ordinance as amended is reproduced in Pet. Apx. 145a-166a.

STATEMENT

A. Introduction.

In the late 1990s, the voters of Michigan passed an initiative legalizing casino gaming in Detroit. Subsequently, Detroit enacted an ordinance establishing a process by which the City of Detroit ("City") would select three applicants for contracts with the City to develop and operate three casinos in Detroit. The ordinance provided that, in the selection

process, a preference was to be given to those who had supported the effort to bring legal casino gaming to Detroit. The preference was one among many factors to be considered and was viewed by Mayor Dennis Archer as merely a "tie-breaker" between proposals that were otherwise equal.

Respondent Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Lac Vieux") never submitted a casino development proposal. Nevertheless, it filed a suit in the United States District Court for the Western District of Michigan ("District Court") challenging the selection process. In its second amended complaint, Lac Vieux for the first time introduced the claim that the preference violated its right to freedom of speech under the First Amendment.

On cross-motions for summary judgment, the District Court held that the ordinance did not implicate the First Amendment, and granted summary judgment for Petitioners. Lac Vieux appealed. The Sixth Circuit reversed, holding that ordinance did implicate the First Amendment. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999) ("*Lac Vieux I*"). The Sixth Circuit said that on remand the District Court was to subject the ordinance to the "strict scrutiny" test.

On remand, the District Court found that the ordinance satisfied strict scrutiny. Lac Vieux again appealed. In a two-to-one decision, the Sixth Circuit reversed. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876 (6th Cir. 2002) ("*Lac Vieux II*"). The majority ruled that the ordinance violated the First Amendment because it did not pass the strict scrutiny test. The dissent disagreed that strict scrutiny applied and concluded that the ordinance was subject to at most the more

lenient deferential balancing test employed by this Court in public contracting cases.

B. Factual and Procedural Background.

This case arises out of a long campaign to legalize casino gaming in Detroit. Atwater Entertainment Associates, L.L.C. ("Atwater") and Greektown Casino, L.L.C. ("Greektown") advanced that effort in 1994. They sought passage of Detroit ballot initiatives that approved Atwater and Greektown to conduct casino gaming in Detroit, should it become permitted under Michigan law. After these local initiatives were passed, Atwater and Greektown sponsored a statewide initiative to legalize casinos in Detroit.

In November 1996, Michigan's electorate enacted this initiative, known as Proposal E, which authorized three casinos in Detroit and provided that the tax revenues would be used for statewide K-12 education and for police, health, and economic development in Detroit. Proposal E was amended by the legislature and codified as the Michigan Gaming Control and Revenue Act ("MGCRA"), M.C.L. 432.201 *et seq*. In its procedure for awarding casino licenses, Proposal E provided a preference to Atwater and Greektown, the two developers that had been specifically approved by the Detroit voters.

On February 26, 1997 Lac Vieux filed a lawsuit in the United States District Court for the Western District of Michigan, asserting a variety of theories challenging the preference in the MGCRA.[1] (Complaint, Pet. Apx. 190a-

---

[1] The District Court's jurisdiction was invoked under 28 U.S.C. §1331 (general federal question jurisdiction).

212a.) The original complaint did not claim that the preference implicated the freedom of speech.

Detroit has suffered from substantial population loss and economic disinvestment over the last few decades. (Declaration of Mayor Dennis Archer ("Archer Decl.") ¶ 3, Pet. Apx. 281a.) Casino gaming was a key component in the City's economic revitalization, in part because the casinos would help solve the City's serious decline in tax revenues. (*Id.* ¶ 20, Pet. Apx. 286a-287a.)

Accordingly, on June 18, 1997, the Detroit City Council adopted the Casino Development Competitive Selection Process Ordinance, Detroit City Code § 18-13-1 *et seq.* (the "ordinance") (Pet. Apx. 145a-166a.), which was later amended by Detroit City Ordinance 46-98. (Pet. Apx. 167a-189a.) It authorized the Mayor to select three proposers and negotiate casino development agreements with them, subject to approval by the City Council.

The ordinance provided that a prospective developer was entitled to a preference if it met the following criteria:

> (1) Its proposal meets the criteria established by this Chapter and by the request for proposals;
>
> (2) It was the initiator of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and
>
> (3) It made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming.

Detroit City Code § 18-13-6(a). (Pet. Apx. 154a-155a.) Only two developers — Greektown and Atwater — could possibly qualify for the preference.

The ordinance did not guarantee selection of the developers who qualified for the preference. It simply defined the "preference" as "a more favorable position given to one prospective developer over another" in the selection process. Detroit City Code § 18-13-2. (Pet. Apx. 149a.) The Mayor could decide *not* to select a developer entitled to the preference, and ultimately he was to "exercise his discretion in selecting . . . the three (3) prospective developers whose proposals are deemed by the Mayor to be in the best interest of the City." Detroit City Code § 18-13-7(a). (Pet. Apx. 155a.)

The preference was only one factor in the selection process; the ordinance identified numerous other factors to be considered in selecting the proposals that were in the best interests of the City. For example, the ordinance stated that the best interest of the City included "obtain[ing] the highest quality proposals," and "select[ing] three designated developers who have local participation . . . and have the demonstrated economic capability and experience with constructing and operating major land-based casinos[.]" Detroit City Code §§ 18-13-1(4) and (10). (Pet. Apx. 168a, 169a.) Also, the ordinance stated: "[w]ithout limiting the discretion of the Mayor, the following broad criteria should be considered," including several criteria besides the preference: (1) background, experience, and success with other major casinos, (2) financial strength, (3) design quality, (4) economic development benefits to the City, (5) infrastructure improvements, and (6) plans for addressing social issues. Detroit City Code § 18-13-3(c). (Pet. Apx. 151a.) The ordinance also listed several eligibility factors,

including "character, reputation, experience and financial capability," and listed numerous additional factors to be considered by the City Council. Detroit City Code §§ 18-13-4(b)(1), 18-13-8. (Pet. Apx. 152a, 156a-164a.)

On June 23, 1997, the City issued a Request for Proposals/Qualifications ("RFP/Q") for Phase I of the selection process, spelling out the process to apply for selection to develop a casino complex. The RFP/Q set a $50,000 application fee, and required a wealth of information.

Lac Vieux did not submit a casino proposal. However, eleven developers did submit their Phase I proposals by the August 1, 1997 deadline. To evaluate the proposals, the Mayor assembled a team of City representatives and outside professional consultants.

Meanwhile, Lac Vieux filed a first amended complaint in August 1997, challenging the preference in the ordinance. (First Amended Complaint, Pet. Apx. 213a-245a.) Again, this pleading did not suggest that the preference in any way affected the freedom of speech.

On August 22, 1997, the Mayor announced the elimination of four of the proposers and issued an RFP/Q (Phase II) to the remaining seven, which called for even more exacting documentation, along with a $250,000 fee. The remaining developers submitted elaborate Phase II proposals, which the City extensively analyzed.

After Phase II of the selection process was under way, in September 1997, Lac Vieux filed its second amended complaint, which raised a new theory — that the preference in the ordinance abridged its right of free speech. (Second Amended Complaint, Pet. Apx. 246a-279a.) The parties then

filed cross-motions for summary judgment. On October 31, 1997, Judge Robert Holmes Bell granted the Petitioners' motion for summary judgment and denied Lac Vieux's motion for summary judgment. Judge Bell granted Defendants' motions on Lac Vieux's First Amendment and Equal Protection claims because (1) Lac Vieux lacked standing to make these claims, (2) the preference did not implicate the First Amendment, and (3) Lac Vieux's Equal Protection claim did not survive a rational basis analysis. (10/31/97 Opinion, Pet. Apx. 44a-89a.) On November 24, 1997, Lac Vieux appealed the summary judgment to the Sixth Circuit.

During this period, the City completed the selection process. On November 7, 1997 the Mayor, after exhaustive analysis, reduced the Phase II proposers to four finalists, and on November 20, 1997, he announced that Detroit Entertainment L.L.C. (which included Atwater), Greektown Casino, L.L.C., and MGM Grand Detroit, LLC, had been selected. (Archer Decl. ¶¶ 13-14, Pet. Apx. 285a.) The Mayor had not considered the preference in narrowing the field of Phase I proposers to seven on August 22, 1997 or in narrowing the seven Phase II proposers to four on November 7, 1997. (*Id.* ¶ 15, Pet. Apx. 285a.) The preference only came into play as a tie-breaker to choose among the final four, where it operated in favor of Greektown (Detroit Entertainment and MGM were selected without any regard to the preference). (*Id.* ¶ 16, Pet. Apx. 285a.)

Immediately after the final selections, the City negotiated with each of the three successful proposers, resulting in City Council approving comprehensive development agreements in April 1998. (Archer Decl. ¶ 22, Pet. Apx. 287a.) Each development agreement required construction of a world-class permanent casino complex, including a major hotel. The total projected cost of the three

permanent casino complexes exceeded $1.8 billion. (*Id.*)

Meanwhile, the City authorized the developers to construct temporary casinos in downtown Detroit. (Archer Decl. ¶¶ 29-30, Pet. Apx. 290a-291a.) These developers spent several hundred million dollars creating the temporary casinos. (*Id.* ¶ 31, Pet. Apx. 291a.) The temporary casinos were licensed and opened between July 1999 and November 2000.

The temporary casinos directly provide thousands of jobs in Detroit and generate substantial numbers of other well-paying jobs for Detroit area residents. They have been projected to generate $246 million in taxes and fees for the City over the three years they will operate and many millions more for K-12 education throughout the State. (Archer Decl. ¶ 32, Pet. Apx. 291a.)

Virtually irreversible tax and budgetary changes were made in reliance on the planned opening of the casinos. (Archer Decl. ¶¶ 33-44, Pet. Apx. 291a-295a.) Michigan's Governor and Legislature insisted on reductions in state revenue sharing to the City and reduction of the tax burden on Detroit's citizens and businesses. (*Id.* ¶¶ 39, 41, Pet. Apx. 293a-294a.) These changes in Detroit's tax structure and in its share of state revenue-sharing dollars were predicated on the assumption that the revenues would be replaced by tax revenues from the casinos. (*Id.* ¶ 43, Pet. Apx. 294a.)

On April 12, 1999, the Sixth Circuit reversed Judge Bell's decision. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999) ("*Lac Vieux I*"). (Pet. Apx. 16a-43a.) With respect to the merits of the First Amendment claim, *Lac Vieux I* ruled that, contrary to Judge Bell's finding,

the ordinance "does implicate the First Amendment." *Id.* (Pet. Apx. 38a-39a.) The Sixth Circuit then addressed the constitutional test to be applied on remand. It concluded that "the ordinance is content-based and is therefore subject to strict scrutiny." *Id.* (Pet. Apx. 40a.) The Sixth Circuit then remanded the case to the District Court for further proceedings. *Id.* at 410. (Pet. Apx. 43a.)

On October 21, 1999, Lac Vieux filed a preliminary injunction motion, demanding that the casino project come to a halt because its free speech rights had supposedly been violated by the selection process that had been completed nearly two years before. The District Court denied the motion, reasoning that even if Lac Vieux could establish its constitutional claims, the equities militated heavily against giving Lac Vieux the extraordinary equitable relief it sought. (12/2/99 Opinion and Order, Pet. Apx. 93a-120a.) Lac Vieux did not appeal this ruling.

Instead, Lac Vieux filed a motion for partial summary judgment seeking a declaratory judgment that the ordinance was unconstitutional. Petitioners filed cross-motions for summary judgment. After extensive briefing and argument, the District Court denied Lac Vieux's motion and granted the cross-motions. (7/14/00 Opinion and Order, Pet. Apx. 121a-139a.)

Lac Vieux appealed the summary judgment to the Sixth Circuit. The Sixth Circuit issued its opinion and entered its judgment on January 11, 2002. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876 (6th Cir. 2002) ("*Lac Vieux II*"). (Pet. Apx. 1a-15a.) In a two-to-one decision, the Sixth Circuit reversed and remanded for further proceedings.

The majority applied strict scrutiny to the ordinance, ruling that the "doctrine of the law of the case requires us to honor" *Lac Vieux I*'s determination that "the ordinance is subject to the test commonly known as 'strict scrutiny'." 276 F.3d at 879. (Pet. Apx. 5a.) *Lac Vieux II* then went on to hold that the ordinance failed the strict scrutiny test, reversed the judgment and remanded for further proceedings.

The dissent concluded that the law of the case doctrine did not bind the panel to *Lac Vieux I*'s strict scrutiny pronouncement because "that conclusion was gratis dictum." 276 F.3d at 881. (Pet. Apx. 9a.) Furthermore, the dissent found that strict scrutiny was the wrong test because it conflicted with the recent rulings of this Court which apply a deferential balancing test to public contracting decisions. *Id.* at 883. (Pet. Apx. 11a-12a.) *See Board of County Commissioners v. Umbehr*, 518 U.S. 668; 116 S. Ct. 2342; 135 L. Ed. 2d 843 (1996) and *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712; 116 S. Ct. 2353; 135 L. Ed. 2d 874 (1996). For those reasons, the dissent suggested that "this issue might be suitable for further review." *Lac Vieux II*, 276 F.3d at 881 (Pet. Apx. 15a.) The majority did not respond to the dissent.

Following the majority's ruling, on February 7, 2002, the District Court, without further hearing, entered an order granting Lac Vieux's motion for summary judgment on its First Amendment and Equal Protection challenges to the ordinance and declared the ordinance to be unconstitutional. (2/7/02 Order, Pet. Apx. 140a-141a.)

Relying on the Sixth Circuit's decision, Lac Vieux filed a motion for further relief on March 12, 2002. Lac Vieux sought a declaration that the development agreements and licenses are invalid and an injunction to shut down the

casinos. On March 21, 2002, the District Court ordered the City to show cause why it should not declare the current casino development agreements and licenses to be invalid and void. (3/21/02 Order to Show Cause, Pet. Apx. 142a-144a.)

REASONS FOR GRANTING THE PETITION

This Court should grant this petition and issue a writ of certiorari to the Sixth Circuit. There are ample grounds to issue the writ.

This case presents a direct conflict between the Sixth Circuit's ruling that the ordinance is subject to strict scrutiny and this Court's precedents in the public contracting context. This Court has recently held that a First Amendment challenge to a public contracting decision is *at most* subject to a deferential balancing test. *Board of County Commissioners v. Umbehr*, *supra*, *O'Hare Truck Service, Inc. v. City of Northlake*, *supra*. Those cases explicitly rejected strict scrutiny as the proper test, recognizing that where, as here, a local government acts as a contractor, rather than as a sovereign, its decisions are due considerable deference. Thus, the Sixth Circuit, by subjecting the ordinance to the most severe, instead of the most lenient, level of constitutional review, is in direct conflict with this Court's decisions.[2]

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[2] *Lac Vieux II* did not independently examine the issue of the proper constitutional test because it considered *Lac Vieux I*'s conclusion that the ordinance was subject to strict scrutiny to be the "law of the case." *Lac Vieux II*, 276 F.3d at 879. (Pet. Apx. 5a.) That ruling was erroneous because *Lac Vieux I*'s conclusion was *dicta*, since the issue was not ruled on by the District Court, not briefed or argued on appeal and not required for the resolution of the issues on appeal. *See Lac Vieux I*, 172 F.3d at 409. (Pet. Apx. 40a.) It is well-settled that the law of the case includes only

The Sixth Circuit's application of strict scrutiny to the ordinance has broad implications. The choice of the standard of constitutional review frequently determines the ultimate outcome of the constitutional analysis. The result in *Lac Vieux II* would have been radically different if the ordinance had been subjected to the deferential balancing test. The ordinance furthered the City's legitimate interests in developing casino gaming as a source of jobs and tax revenue and was not intended to, nor did it, suppress speech, not even Lac Vieux's. The danger that other Circuits may follow *Lac*

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previously determined issues, *Quern v. Jordan*, 440 U.S. 332, 347 n. 18; 99 S. Ct. 1139; 59 L. Ed. 2d 358, 370 n. 18 (1979) and, therefore, excludes *dicta*. *See, e.g., Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 326 n. 3 (1st Cir. 2000) ("The law of the case doctrine does not apply to dicta."), *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 988 F.2d 414, 430 (3d Cir. 1993) ("*dicta* . . . cannot be the predicate for a ruling that the doctrine of law of the case was violated." [Footnote omitted.]). Moreover, as the dissent pointed out, even the law of the case is not always binding. It may be disregarded if, like *Lac Vieux I's* pronouncement about strict scrutiny, it is clearly erroneous and works a manifest injustice. *Lac Vieux II*, 276 F.3d at 881. (Pet. Apx. 10a-11a.) *See Arizona v. California*, 460 U.S. 605, 618, n. 8; 103 S. Ct. 1382; 75 L. Ed. 2d 318 (1983).

Even if *Lac Vieux I*'s strict scrutiny discussion is the law of the case, this Court may still review that ruling. As this Court has recognized, the "law of the case cannot bind this Court in reviewing decisions below." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800; 108 S. Ct. 216; 100 L. Ed. 2d 811, 831 (1988). In particular, "a petition for writ of certiorari can expose the entire case to review." *Id.* Thus, "a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review." *Id.*

Vieux II's lead and strike down other public contracting laws that satisfy deferential balancing makes it imperative that this Court review the Sixth Circuit's ruling.

The Sixth Circuit's ruling not only raises serious questions of federal law; it also has grave consequences for the City and people of Detroit. Because it is bound by the Sixth Circuit's decision, the District Court may soon shut down the casinos. That would jeopardize thousands of desperately needed jobs for Detroit's citizens and millions of tax dollars for the City. Before the City and its residents suffer such a set back, this Court should review the Sixth Circuit's decision.

I. THE SIXTH CIRCUIT'S DECISION IS FLATLY CONTRARY TO THIS COURT'S CASES ON THE APPLICATION OF THE FIRST AMENDMENT IN THE GOVERNMENT CONTRACT SETTING.

A. A Deferential Balancing Test Applies To First Amendment Challenges By Existing Contractors To Public Contracting Decisions.

Recently, this Court decided two cases where parties with existing relationships with local governments challenged public contracting decisions based on core political speech. *Board of County Commissioners v. Umbehr*, *supra*, and *O'Hare Truck Service, Inc. v. City of Northlake*, *supra*. In both cases, this Court rejected the strict scrutiny test for First Amendment challenges to public contracting decisions in favor of a deferential balancing test based on reasonableness.

In *Umbehr*, the county board terminated the trash

hauling contract of a vocal opponent of the board, who then filed suit claiming a violation of the First Amendment. Even though core political speech was at issue, this Court explicitly rejected the strict scrutiny test for public contracting cases in favor of a deferential balancing test based on reasonableness:

> Umbehr is correct that if the Board had exercised sovereign power against him as a citizen in response to his political speech, it would be required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest. *But in this case, as in government employment cases, the Board exercised contractual power*, and its interests as a public service provider, including its interest in being free from intensive judicial supervision of its daily management functions, are potentially implicated. *Deference is therefore due to the government's reasonable assessment of its interests as contractor.*

518 U.S. at 678; 135 L. Ed. 2d at 853-54 (emphasis added).

This Court held that the applicable test

> requires a *fact-sensitive and deferential weighing of the government's legitimate interests*. The dangers of burdensome litigation and the de facto imposition of rigid contracting rules necessitate attentive application of the Mt. Healthy requirement of proof of causation and *substantial deference*, as mandated by Pickering, Connick and Waters, *to the government's reasonable view of its legitimate interests*, but not a per se denial of liability.

518 U.S. at 677, 135 L. Ed. 2d at 853 (emphasis added).

The Court summarized the test:

> To prevail, Umbehr must show that the termination of his contract was motivated by his speech on a matter of public concern . . . . If he can make that showing, the Board will have a valid defense if it can show, by a preponderance of the evidence, that, in light of their knowledge, perceptions, and policies at the time of the termination, the Board members would have terminated the contract regardless of his speech. *The Board will also prevail if it can persuade the District Court that the County's legitimate interests as contractor, deferentially viewed, outweigh the free speech interests at stake.*

518 U.S. at 685, 135 L. Ed. 2d at 858 (emphasis added; citation omitted).

In *O'Hare*, decided the same day as *Umbehr*, the mayor dropped a towing company from an approved list for city business because the company had refused to contribute to the mayor's campaign and instead supported his opponent. This Court confirmed that far from applying exacting scrutiny, a "reasonableness analysis" is to be used to evaluate First Amendment claims in public contracting cases. 518 U.S. at 719, 135 L. Ed. 2d at 882. This Court explained:

> Cities and other governmental entities make a wide range of decisions in the course of contracting for goods and services. *The Constitution accords government officials a*

> *large measure of freedom as they exercise the discretion inherent in making these decisions* . . . These are choices and policy considerations that ought to remain open to government officials when deciding to contract with some firms and not others, provided of course the asserted justifications are not the pretext for some improper practice. *In view of the large number of legitimate reasons why a contracting decision might be made, fending off baseless First Amendment lawsuits should not consume scarce government resources.*

518 U.S. at 724-25, 135 L. Ed. 2d at 885-86 (emphasis added; citations omitted). This Court noted there is no First Amendment violation if the government terminates a contractor for reasons unrelated to his political affiliation or if political affiliation is a "reasonably appropriate" qualification for the contract. 518 U.S. at 718-19, 725, 135 L. Ed. 2d at 881-82, 886.

Thus, for cases involving award or denial of government contracts to existing contractors, this Court specifically rejected the strict scrutiny test. Far from requiring the government to establish compelling necessity, this Court repeatedly emphasized that reasonableness would suffice to justify the government's action, and in balancing the interests, the government was entitled to deference.[3]

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[3] *E.g.*, *Umbehr*, 518 U.S. at 677, 135 L. Ed. 2d at 853 ("a fact-sensitive and deferential weighing of the government's legitimate interests" and "substantial deference . . . to the government's reasonable view of its legitimate interests"); 518 U.S. at 678, 135 L. Ed. 2d at 853-54 ("[d]eference is therefore due to the government's reasonable assessments of its interests as

B. Applicants For New Government Contracts May Not Be Entitled To Any First Amendment Protection.

Umbehr and *O'Hare* gave limited First Amendment protection to parties with an existing relationship with the local government. But this Court did not extend even that level of protection to applicants with no such relationship:

> Finally, *we emphasize the limited nature of our decision today*. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, *we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship*.

Umbehr, supra, 518 U.S. at 685, 135 L. Ed. 2d at 858 (emphasis added).

The Third Circuit has held that, although some First Amendment review is available to contractors with an *existing* commercial relationship with the government, *Umbehr* and *O'Hare* cannot be extended to give *any* level of First Amendment review to bidders without such a relationship. *McClintock v. Eichelberger*, 169 F.3d 812, 815-17 (3d Cir. 1999) (bidders without an existing relationship cannot assert

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contractor."); 518 U.S. at 684, 135 L. Ed. 2d at 857 ("a deferentially administered requirement that the government not unreasonably terminate its commercial relationships on the basis of speech or political affiliation[.]"); *O'Hare*, 518 U.S. at 719, 135 L. Ed. 2d at 882 ("reasonableness analysis").

First Amendment claims that they were not awarded a public contract). *See also Prisma Zona Exploratoria De Puerto Rico, Inc. v. Calderon*, 162 F. Supp. 2d 1, 7 (D. P. R. 2001) ("The Supreme Court has refused to extend First Amendment protection to bidders or applicants of government contracts.").

Of course, Lac Vieux only claims that the preference violates the alleged First Amendment rights of applicants for a new casino contract. Under the Third Circuit's reading of *Umbehr* and *O'Hare*, Lac Vieux has no First Amendment claim at all. Thus, the Sixth and Third Circuits are at the extreme opposites of the constitutional spectrum — the Third Circuit gives new bidders *no* First Amendment protection, while the Sixth Circuit accords them the *greatest* protection.

In sum, whether or not new bidders for government contracts enjoy some First Amendment protection, *Umbehr* and *O'Hare* teach that they are entitled to *at most* deferential balancing review, not strict scrutiny. Thus, the Sixth Circuit's decision turns this Court's precedent on its head by giving *new* bidders strict scrutiny review — that is, *greater* protection than this Court afforded to plaintiffs with *existing* government contracts.

II. THE SIXTH CIRCUIT ERRED IN RULING THAT THE ORDINANCE VIOLATES THE FIRST AMENDMENT.

The Sixth Circuit's decision to subject the ordinance to strict scrutiny has far-reaching implications. By choosing strict scrutiny, the Sixth Circuit virtually assured the outcome

of the case. As this Court has observed, "it is the rare case in which . . . a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211; 112 S.Ct. 1846; 119 L. Ed. 2d 5 (1992). As shown below, the outcome would have been radically different if the ordinance had been examined under the toughest test applicable to it — deferential balancing.[4] Thus, if other Circuits adopt *Lac Vieux II*'s strict scrutiny approach, other public contracting laws satisfying deferential balancing are likely to be erroneously struck down as well.

While the ordinance did not survive *Lac Vieux II*'s strict scrutiny analysis, it easily satisfies the deferential balancing test because the City's interests outweigh Lac Vieux's minimal free speech interests. Thus, the ordinance does not run afoul of the First Amendment. The Sixth Circuit erred in holding otherwise.

A. The Preference Was Only a Tie-Breaking Factor.

The ordinance did not require that casino development contracts be given to those who qualified for the preference. The ordinance simply stated that a qualifying developer should receive "a more favorable position" in the selection process, without defining how much more favorable. The Mayor interpreted "more favorable" to mean that the preference was merely a tie-breaking factor, all other things being equal. (Dennis Archer Deposition, pg. 35, Pet. Apx. 304a.) That is certainly a reasonable interpretation,

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[4] Lac Vieux has effectively conceded that the ordinance passes the deferential balancing test, since it did not appeal the District Court's ruling that the ordinance satisfied the similar rational basis test. *See Lac Vieux I*, 172 F.3d at 400. (Pet. Apx. 17a.)

particularly since the ordinance listed numerous other factors to consider.[5]

It is a "well-established principle" that laws should be "interpreted so as to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474, 482-83; 108 S. Ct. 2495; 101 L. Ed. 2d 420 (1988) (rejecting a First Amendment challenge to an ordinance because it was "readily subject to a narrowing construction" that avoided constitutional infirmities). *Accord*, *Jones v. United States*, 529 U.S. 848, 851; 120 S. Ct. 1904; 146 L. Ed. 2d 902, 907 (2000) ("constitutionally doubtful constructions should be avoided where possible"); *Pak v. Reno*, 196 F.3d 666, 673 (6th Cir. 1999). Where, as here, the law is reasonably susceptible to narrow construction, the courts must adopt the narrow construction that saves the law, rather than a broad construction which might render it void. *Id*. Therefore, the preference must be narrowly construed as a mere tie-breaking factor.

This limited nature of the preference is not just an important fact to weigh in the balance. It clinches the constitutional question as a matter of law because this Court has held that using political speech as a minor factor (rather than as the determining factor) in awarding public contracts does not implicate the First Amendment.

Thus, emphasized that before a court even reaches the point of applying the deferential balancing test, the threshold

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[5] In fact, the Mayor did not consider the preference until the end of the selection process, when he used it as a tie-breaker to decide between the relatively-equal proposals submitted by Greektown and Mirage. (*See*, Archer Decl. ¶¶ 15-16, Pet. Apx. 285a.) Thus the actual implementation of the preference was consistent with the narrow interpretation.

issue is whether the plaintiff's political expression was the but-for cause of the decision to deny a government contract.[6] If political expression was not the determining cause of the decision, then there is no First Amendment review. *Umbehr*, 518 U.S. at 675, 685, 135 L. Ed. 2d at 852, 858.

This necessarily implies that First Amendment review is not triggered unless the challenged preference is the conclusive factor in deciding who gets a contract and who does not. Thus, using speech as a minor consideration in awarding public contracts does not abridge the First Amendment.

In another recent case, this Court held that considering speech as one factor among many when the government awards grants does not offend the First Amendment. In

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[6] To prevail, an employee must prove that the conduct at issue was constitutionally protected, and that it was a *substantial or motivating factor* in the termination. If the employee discharges that burden, the government can escape liability by showing that *it would have taken the same action even in the absence of the protected conduct*. And even termination *because of* protected speech may be justified when legitimate countervailing government interests are sufficiently strong.

Umbehr, 518 U.S. at 675, 135 L. Ed. 2d at 852 (emphasis added). *See also*, 518 U.S. at 685, 135 L. Ed. 2d at 858 (plaintiff must show that the action "was motivated by his speech," then defendant can prevail by showing that it "would have terminated the contract regardless of his speech," or if its "legitimate interests as contractor, deferentially viewed, outweigh the free speech interests at stake").

National Endowment for the Arts v. Finley, 524 U.S. 569; 118 S. Ct. 2168; 141 L. Ed. 2d 500 (1998), this Court held that a federal statute instructing the NEA when awarding grants to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public" did not affect First Amendment rights enough to require any level of scrutiny. 524 U.S. at 576, 141 L. Ed. 2d at 509. The Court emphasized that the statute "adds 'considerations' to the grant-making process; it does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application." 524 U.S. at 580-81, 141 L. Ed. 2d at 512. Because the statute "admonishes the NEA merely to take 'decency and respect' into consideration," the Court did not "perceive a realistic danger that [the statute] will compromise First Amendment values." 524 U.S. at 582-83, 141 L. Ed. 2d at 513.[7]

Obviously, by authorizing decency and respect as factors to be considered, the law endorsed more favorable treatment for decent and respectful art than for indecent and disrespectful art. Yet this Court held that this minor factor did not trigger any level of First Amendment scrutiny.

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[7] The Court also noted that (just as when government is acting as employer or contractor), there are diminished First Amendment interests when government is acting as proprietor awarding project funds: "Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Finley*, 524 U.S. at 587-88, 141 L. Ed. 2d at 516.

Here, just as in *Finley*, the preference was not a categorical requirement, but merely one consideration among many. *Finley* strongly suggests that such a mere plus factor in the awarding of public grants (or contracts) does not seriously impinge on the First Amendment. *See*, *Gentala v. Tucson*, 213 F.3d 1055, 1063 (9th Cir. 2000) (*Finley* hinged on the difference between excluding an applicant based on speech and merely making speech "one of several criteria . . . to consider when making funding decisions.").[8]

In sum, as a matter of law, recent precedents from this Court strongly suggest that the distinction between a mere factor and a guarantee is dispositive, or at least highly significant, in determining whether there is an abridgement of the First Amendment. At a minimum, the limited role of the preference militates against finding a serious impairment of free speech interests in the balancing calculus.

B. The Purpose of the Preference Was Not to

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[8] Similarly, the distinction between a mere tie-breaking factor and a conclusive factor has been recognized as having constitutional significance in the equal protection context. This Court has approved affirmative action plans as long as the preference is one factor among many, and not by itself dispositive. *E.g.*, *Metro Broadcasting v. FCC*, 497 U.S. 547, 597-98 & n. 50; 110 S. Ct. 2997; 111 L. Ed. 2d 445, 483-84 & n. 50 (1990) (preference for minority businesses in competition for radio and TV licenses acceptable because it is "simply a 'plus' factor considered together with other characteristics of the applicants" and "minority ownership does not guarantee that an applicant will prevail."); *Regents of University of California v. Bakke*, 438 U.S. 265, 317-19; 98 S. Ct. 2733; 57 L. Ed. 2d 750, 788-89 (1978); *Johnson v. Transportation Agency*, 480 U.S. 616, 638; 107 S. Ct. 1442; 94 L. Ed. 2d 615, 635 (1987).

Regulate Speech.

The preference was not intended to control speech. There is no evidence that it was intended to exact revenge on political opponents, to suppress certain ideas, or to coerce conformity to a viewpoint. The preference was meant to give some credit to Atwater and Greektown, the two local organizations that had been specifically chosen as casino developers by Detroit voters in 1994 and had demonstrated their commitment to the Detroit community.

This preference for Greektown and Atwater only incidentally touched on speech concerns because one of the qualifications for the preference was cast in terms of active, significant support for the statewide initiative to legalize casinos. But the preference did not give an advantage to any active, significant supporters of the statewide initiative except for Greektown and Atwater.

The preference qualifications were thus merely an alternative way of identifying Greektown and Atwater. If the ordinance just said, "Greektown and Atwater get a preference," no one could claim that it violated the First Amendment. But that is all the ordinance did.[9] It simply

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[9] At worst, the preference might be said to constitute a slight advantage for two particular commercial enterprises, but even outright favoritism can only be reviewed under the rational basis test. *New Orleans v. Dukes*, 427 U.S. 297, 303; 96 S. Ct. 2513; 49 L. Ed. 2d 511, 517 (1976) (upholding city ordinance that prohibited pushcart food sales in the French Quarter, with the exception of two preferred long-time vendors: "States are accorded wide latitude in the regulation of their local economies . . . the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that

gave a preference to Greektown and Atwater, although it described them in terms of their approval by Detroit voters and their role in securing passage of the statewide casino proposal. *Substantively*, it was no different from an ordinance that simply named Atwater and Greektown as the sole qualifiers for the preference. The constitutionality of a law should not depend on how an organization is identified or described.[10]

In sum, there was no First Amendment violation because the purpose was not to silence dissenting views or influence political speech.

C. At Most, The Preference Had Only a Minimal, Attenuated Effect on Speech.

Just as there is no indication of illicit motive behind the ordinance, it also had no actual impact on anyone's political views or activities. Whether there could theoretically be some chilling effect, there is absolutely no evidence that the preference had any *actual* coercive effect on political speech. Thus, as a practical matter, there was no suppression or muting of free speech. In deferentially assessing the reasonableness of the preference, the actual reality should count more than speculation about possible chilling effects.

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neither affect fundamental rights nor proceed along suspect lines.").

[10] Actually, nothing required the City to use a competitive bidding process; the City could have simply entered into contracts with Greektown and Atwater, rather than requiring them to demonstrate the superiority of their proposals in the competitive process. *See, O'Hare*, 518 U.S. at 724-25, 35 L. Ed. 2d at 885-86.

Moreover, only a narrow field of persons could arguably have their free speech rights affected by the ordinance — the alleged adverse effect of the preference was limited to a handful of casino developers. And even as to these few, the ordinance did not affect their speech generally, or cut a wide swath; it was a one-time selection process which at most related to their speech activity regarding a single initiative proposal.[11]

D. Lac Vieux Does Not Have a Sufficiently Serious or Substantial First Amendment Interest to Warrant Overturning a Selection Process That Was Completed Over Four Years Ago.

In balancing the various interests, it is relevant to consider the degree of impairment of the plaintiff's First Amendment rights — was there a truly serious deprivation or just abstract, theoretical harm?

Lac Vieux does not have a serious claim that its freedom of speech was significantly impaired, or, indeed, that it suffered any real injury at all as a result of the preference.

The evidence demonstrates that the preference did not cause Lac Vieux any actual injury. Lac Vieux admitted that it could not compete for a casino in Detroit without enlisting an experienced, well-funded business partner. Thus, the

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[11] Moreover, all the casino developers interested in obtaining a casino in Detroit (the only ones possibly affected by the supposed First Amendment problem in the selection process), of course were huge *supporters* of casinos. The ordinance did not harm or penalize the opponents of casinos, since these anti-casino folks were not interested in applying for a casino development agreement.

executive director of Lac Vieux testified: "it was essential that we had partners." (Thomas Kolinsky Deposition ("Kolinsky Dep."), pgs. 96, 104. Pet. Apx. 335a-336a, 339a.) What prevented Lac Vieux from competing for a casino was not the preference, but its inability to interest a partner with the necessary financial resources. Mr. Kolinsky admitted this: "Q: And because you didn't have a partner, you didn't submit a proposal in response to the RFPQ phase one? A: Correct." (Kolinsky Dep., pgs. 148-49, Pet. Apx. 346a-348a.) John McGeshick, the chairman of Lac Vieux, also admitted this: "Q: Other than the fact that you couldn't find a partner, was there any reason why you couldn't have submitted the application? A: No." (John McGeshick Deposition, pg. 57, Pet. Apx. 308a.)

These unequivocal admissions show that Lac Vieux's alleged injury was caused not by the preference for Greektown and Atwater, but by Lac Vieux's inability to attract a partner who had sufficient financial resources. In short, the preference was not the cause of any actual harm to Lac Vieux.[12]

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[12] Mr. Kolinsky speculated that the various potential partners contacted by Lac Vieux might have declined to participate in the Detroit process because of the preference. However, he testified that this was just second-hand speculation. (Kolinsky Dep., pgs. 37, 85-86, Pet. Apx. 325a-326a, 329a-330a.) The District Court found that "Mr. Kolinsky has admitted that he has no personal knowledge of any entity that declined to be a financial partner because of the preference. Plaintiff's argument that the preference prevented it from securing a partner is not supported by an evidence of record. It is pure speculation." (12/2/99 Opinion, pg. 16, Pet. Apx. 109a.) One of the potential partners Lac Vieux contacted about a joint venture (Rio) in fact submitted its own proposal in conjunction with a local Detroit group in response to

E. The Narrow Preference Substantially Furthered Worthy and Important Governmental Objectives.

According to this Court, the ordinance must be sustained if it was a reasonable (not necessary) way to further legitimate (not compelling) governmental interests. *E.g.*, *Umbehr*, 518 U.S. at 677, 135 L. Ed. 2d at 853. It meets that test.

The City was in desperate need of the casinos for its economic revitalization. The casinos were a controversial issue that required popular support in order to succeed. By granting a slight preference to these two committed local businesses that had been approved by the voters, the City was trying to secure and stabilize the casino project that was so vital to its economic rebirth. The purpose of the limited preference was not to coerce or penalize speech, but to grant Atwater and Greektown some potential extra credit since they had been specifically chosen by Detroit voters to operate casinos and had demonstrated their commitment to Detroit by spearheading economic development efforts for the City. It was certainly reasonable to give a slight preference to these known and locally-committed developers who had been endorsed by the City voters. Being wanted by Detroit voters was a "reasonably appropriate" qualification for being a Detroit casino developer. *O'Hare*, 518 U.S. at 714, 717, 135 L. Ed. 2d at 879, 881; *Umbehr*, 518 U.S. at 675, 135 L. Ed. 2d at 851.

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the RFP/Q, which proves that the preference did not deter it from partnering with Lac Vieux or from participating in the Detroit casino selection process. (Kolinsky Dep., pgs. 16-17, Pet. Apx. 320a-322a.)

Given that the reasons for the limited preference were not speech-related, when the particular interests at stake are weighed "with sensitivity to governmental needs," the deferential balancing test is easily met. *Umbehr*, 518 U.S. at 678, 135 L. Ed. 2d at 853. All things considered, the City's "legitimate interests as contractor, deferentially viewed, outweigh the free speech interests at stake." 518 U.S. at 685, 135 L. Ed. 2d at 858.

In sum, the ordinance survives constitutional review under the toughest standard applicable to it — deferential balancing. By subjecting the ordinance to the far more exacting strict scrutiny test, the Sixth Circuit struck down a valid law.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00-1879

[Filed January 11, 2002]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,	)
Plaintiff,	)
v.	)
THE MICHIGAN GAMING CONTROL BOARD, THOMAS DENOMME, MICHAEL STACEY, PAULA BLANCHARD, RICHARD DAVIS, and KAREN BATCHELOR FARMER; and THE CITY OF DETROIT, MICHIGAN, DENNIS W. ARCHER, MARY ANN MAHAFFEY, GIL HILL, CLYDE CLEVELAND, SHEILA COCKREL, BRENDA M. SCOTT, NICHOLAS HOOD, III, ALBERTA TINSLEY-WILLIAMS, MEL RAVITZ, and KAY EVERETT,	)
Defendants,	)

ATWATER ENTERTAINMENT, L.L.C.;)
GREEKTOWN CASINO, L.L.C.; and)
FRANK J. KELLEY, ATTORNEY)
GENERAL, *ex rel* THE PEOPLE OF)
THE STATE OF MICHIGAN,)
)
Intervenor/Defendants.)
_____)

Appeal from the United States District Court
for the Western District of Michigan at Marquette.
Robert Holmes Bell, Chief District Judge.
No. 97-00067

Argued: April 24, 2001

Before: MARTIN, Chief Judge; MOORE, Circuit Judge;
O'MALLEY, District Judge.*

OPINION

BOYCE F. MARTIN, JR., Chief Judge. Upon the legalization of gambling in Detroit, the City enacted an ordinance establishing how it would issue three licenses for the operation of its new casinos. Everyone interested in this opportunity should have been allowed to compete for it on the same terms. The ordinance instead incorporated an advantage for two companies that had been active in the movement to legalize the gambling in the first place. Because Detroit based the advantage on that activity, and thereby penalized potential

* The Honorable Kathleen M. O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

applicants who did not engage in it themselves, we hold that the ordinance in its current form is unconstitutional.

I.

Defendants Atwater Entertainment Associates and Greektown Casino organized petition drives to lift Michigan's ban on off-reservation gambling. First, they helped place two initiatives on the Detroit city ballot that, in tandem, would authorize casinos within the city limits so long as voters statewide approved as well. When the Detroit initiatives passed, Atwater and Greektown proceeded to organize the necessary statewide referendum, widely known as "Proposal E." Proposal E also passed. As a result, casino gambling in Detroit became legal.

Next, the Michigan state legislature passed the Michigan Gaming Control and Revenue Act, permitting the mayor of Detroit to choose three casino licensees. The city's related ordinance, the subject of this case, governed the mayor's selections. In numerous respects, the ordinance rewards Atwater and Greektown for their efforts during the state and local referenda campaigns. For example, the ordinance includes a "statement of intent" declaring that "it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City, and who actively promoted and significantly supported the State initiative authorizing gaming." Detroit City Code, §§18-13-1(i). Another portion expressly prefers casino developers who, assuming they meet the other eligibility criteria, were "initiator[s] of a casino gaming

proposal which was approved by the voters of this City prior to January 1, 1995; and . . . made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming." Detroit City Code, §§18-13-6(a)(2). Unsurprisingly, the mayor ultimately awarded Atwater and Greektown two of the three licenses, and both companies currently operate casinos in Detroit.

II.

An Indian tribe that offers gambling on its Michigan reservation, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, sued because of the obvious handicap it and all other prospective off-reservation operators faced in the Detroit licensing process. Essentially, the Lac Vieux claims that the ordinance's preference provisions discriminate against it for having not taken Atwater and Greektown's particular political position in the casino legalization debate. According to the Lac Vieux, the ordinance's licensing procedure thus violates the guarantees of the First Amendment as well as of the Fourteenth Amendment's Equal Protection Clause.

In granting Detroit summary judgment on October 31, 1997, the district court held that the Lac Vieux lacked standing to bring its claims and that, even if the Lac Vieux did have standing, the claims lacked merit. The Lac Vieux appealed. We reversed the district court on all these issues, holding in particular that the district court's exceptionally deferential review of the ordinance, considering only whether Detroit conceivably could have had any rational reason to enact it as it had, was inappropriate. *See Lac Vieux Desert Band v. Michigan Gaming Control Board*, 172 F.3d 397, 409

(6th Cir. 1999) (*Lac Vieux I*). On remand, the district court purported to demand more of the ordinance but again sustained it. This second appeal followed. Our review of the district court's decision is *de novo*. *See United States v. Hill*, 167 F.3d 1055, 1063 (6th Cir. 1999).

III.

The doctrine of the law of the case requires us to honor the prior rulings of this Court in this litigation. Although we acknowledge that there are limited exceptions to this general principle, we are satisfied that none of them apply now. *See United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990); *Coal Resources, Inc. v. Gulf & Western Indus., Inc.*, 865 F.2d 761, 767 (6th Cir. 1989) (per curiam). The law of the case here is *Lac Vieux I*, and it establishes three propositions for our purposes: that the Lac Vieux has standing, that the preference provisions restrict First Amendment rights, and that, because the law permits that restriction only on the rarest of occasions, the ordinance is subject to the test commonly known as "strict scrutiny."[1] *See Lac Vieux I*, 172 F.3d at 407, 409-10. All *Lac Vieux I* leaves for us is the test's administration. We start by presuming that the ordinance is unconstitutional. Detroit can overcome that presumption only by proving that the ordinance is necessary to serve a compelling state interest and narrowly drawn to achieve that interest. *See id.* at 409 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992)). In our view, the City is unable to meet this heavy burden. With the preference, the ordinance is fatally unfair, and the casino licenses Detroit has

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[1] *Lac Vieux Desert Band v. Michigan Gaming Control Board*, 172 F.3d 397, 409 (6th Cir. 1999).

issued to date are illegitimate.

Applying the analytic framework that *Lac Vieux I* sets forth, we first ask whether Detroit can demonstrate that the ordinance serves a *compelling* governmental interest. It can. We accept that the preference promotes the stability of Detroit's political and tax systems, and these interests are indeed compelling under the First Amendment. *See Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Gable v. Patton*, 142 F.3d 940, 947 (6th Cir. 1998) (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)); *see also Minneapolis Star v. Commissioner*, 460 U.S. 575, 586 (1983) (deeming government interest in raising revenue "critical" while deciding case on other grounds).

Given that the ordinance serves these "compelling" interests in some measure, we next ask if the ordinance is necessary in order for the interests to be served at all. Likewise, with regard to the First Amendment problem that *Lac Vieux I* has already decided exists, we look at whether the ordinance is the *least restrictive* possible way of serving those interests. Here, Detroit's arguments become unpersuasive. Were we to agree that the ordinance is theoretically *capable* of ensuring for Detroit a stable political system and a sound tax system, the proper inquiry remains whether those things cannot exist without the current ordinance on the books. Detroit stresses that the City's electorate had rejected proposals that would have legalized casino gaming on five prior occasions, and projects that it would also have rejected this one without some indication of the likelihood that the casinos would be run by, as the district court described Atwater and Greektown, "Detroit businesses who had already invested in the City [and] who had demonstrated their

commitment to the revitalization of the City." However, this explanation goes to whether the preference was necessary to getting the ordinance passed, not to whether the preference is necessary to serve Detroit's compelling interests. In any event, the protections of the First Amendment cannot just be wished away, regardless of how much the government might like to do so. Furthermore, Detroit collapses the doctrinally accurate argument of whether the ordinance is necessary to serve its compelling interests into an argument that casinos themselves are necessary to do so. But Detroit has not demonstrated that its political and economic conditions are yet quite so dire that casinos present their last chance for salvation.

Accordingly, the preference renders the ordinance invalid. Absent the provision, we are confident that Detroit's interests could be served without intruding upon the Lac Vieux's First Amendment rights. The district court apparently decided otherwise because Detroit previously had rejected a means more restrictive than the preference, giving Atwater and Greektown an outright guarantee that casino licenses would be theirs. This was erroneous. As the Lac Vieux has put it, the district court effectively turned this aspect of strict scrutiny "on its head," failing to recognize that Detroit's ordinance must do the least damage to the First Amendment, not just avoid doing the most damage. A less restrictive means of serving the interests Detroit has identified is simply leaving the preference out.

By employing the preference, Detroit basically sought to end the high-stakes competition for two of the three Detroit casino licenses before it really began. This we cannot allow. Barring governments from endorsing or punishing political

activity, or the lack of it, is among the paramount functions of the First Amendment's Free Speech Clause. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting in part *Carey v. Brown*, 447 U.S. 455, 467 (1980))); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("One important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" (quoting in part *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion))). In this tradition, the decision of the district court is REVERSED and REMANDED for proceedings consistent with this opinion.

DISSENT

KATHLEEN McDONALD O'MALLEY, District Judge, dissenting. The majority reverses the district court based on two conclusions: (1) the Detroit ordinance is constitutional only if it survives "strict scrutiny;" and (2) the ordinance does not pass this rigorous test. I agree with the second conclusion - as the Supreme Court has noted, "it is the rare case in which . . . a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211 (1992). I do not agree, however, that the ordinance is constitutional only if it survives strict scrutiny analysis. Accordingly, I respectfully dissent.

The majority notes that, in *Lac Vieux I*,[1] a different panel concluded that the preference provisions contained in the ordinance "implicate[] the First Amendment." 172 F.3d at 409. I agree with the majority, op. at 4, that this is the law of the case. I do not agree with the majority, however, that it is also the law of the case that the test for constitutionality which the ordinance must survive is strict scrutiny. While the panel in *Lac Vieux I* wrote: "[a]lthough the district court and the parties have provided little guidance on the question, *principally because the district court did not reach this issue*, we conclude that the ordinance is content-based and is therefore subject to strict scrutiny," *id.* at 409-10 (emphasis added), that conclusion was gratis dictum. *See Black's Law Dictionary* (7th ed. 1999) (defining gratis dictum as "a court's discussion of points or questions not raised by the record"). In fact, the ruling in *Lac Vieux I* was simply and only that the Lac Vieux tribe had standing to challenge the Detroit ordinance and that such a challenge did "implicate the First Amendment." The statement that, on remand, the district court should apply a strict scrutiny analysis to the Detroit ordinance was not necessary to the panel's ruling.

Of course, the district court would have been unwise to ignore the suggestions made in *Lac Vieux I* on how to proceed. I disagree, however, that this Court is constrained by the law of the case doctrine to follow that same suggestion.

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[1] Under *Lac Vieux I*, the ordinance also implicates the Equal Protection Clause by employing a classification that affects "a constitutionally protected fundamental right, the right to freedom of speech," *Lac Vieux I*, 172 F.3d at 410, but both the district court and the parties now treat this portion of the decision as merely an alternative basis for the application of strict scrutiny, *see id.* (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)). We will do the same.

As the *Lac Vieux I* panel expressly stated, at that juncture, neither the parties nor the district court had addressed the critical issue of the appropriate level of constitutional review. As noted, the district court below and the parties on appeal in *Lac Vieux I* focused on whether the plaintiff had standing to assert its claims *at all* and whether, if so, those claims were even cognizable under the First Amendment - legal questions that were hotly disputed. To the extent the *Lac Vieux I* panel expressed an opinion on anything beyond those threshold questions, accordingly, it did so without the benefit of briefing, argument, or a lower court decision on the issue. In contrast, the briefing before this panel contains substantial argument regarding the proper constitutional standard to be applied in the circumstances presented here. I do not believe we should relegate the analysis of this critical question to a one-sentence reference in a prior opinion, out of an unnecessary desire to adhere to the law of case doctrine. Indeed, I do not believe the *Lac Vieux I* panel would feel bound by its own dicta, or expect this panel to be bound by it.

Furthermore, even if *Lac Vieux I* did establish the law of this case to be that the Detroit ordinance must be narrowly drawn to serve a compelling state interest, I still believe we should not be bound by this pronouncement. "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618, n. 8 (1983)). I am afraid that, in fact, the pronouncement in *Lac Vieux I* that the ordinance must survive strict scrutiny is

clearly erroneous, and that application of this test would work a manifest injustice.

In *Board of County Comm'rs, Wabaunsee Cty., Kansas v. Umbehr*, 518 U.S. 668 (1996), the Supreme Court considered the question of "whether, and to what extent, the First Amendment restricts the freedom of federal, state or local governments to terminate their relationships with independent contractors because of the contractors' speech." *Id.* at 673-74. Resolving "a conflict between the Courts of Appeals," the Supreme Court held that: (1) the First Amendment does protect independent contractors from termination of government contracts in retaliation for exercising free speech rights; and (2) "the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection." *Id.* at 673 (citing *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., Illinois*, 391 U.S. 563, 568 (1968)); *see O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996).

The *Pickering* balancing test, in turn, calls for weighing the plaintiff's "right to speak on a matter of public concern against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Hardy v. Jefferson Community College*, 260 F.3d 671, 679-80 (6th Cir. 2001) (quoting *Pickering*, 391 U.S. at 568). And, when measuring the balance, a district court should "deferentially view" the state's "legitimate interests as contractor." *Umbehr*, 518 U.S. at 685. The likelihood that the Detroit ordinance could pass constitutional muster under this test, of course, is far higher than under the strict scrutiny test.

Indeed, even this *Umbehr/Pickering* balancing test may be too stringent. The Supreme Court in *Umbehr* was careful to note the "limited nature" of its decision, stating that, because the plaintiff's lawsuit "concern[ed] the termination of a *pre-existing commercial relationship* with the government, [the Court did] not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." *Id.* at 685 (emphasis added). When, as here, there is *not* a pre-existing commercial relationship between the state and the bidder or applicant for a government contract, the balance falls even more in favor of the state. *See McClintock v. Eichelberger*, 169 F.3d 812, 815-17 (3rd Cir. 1999), *cert. denied*, 528 U.S. 876 (1999) (noting, in circumstances similar to those presented in this case, that the balancing test called for by *Umbehr* and *O'Hare* was too strict, because the plaintiff did not have a pre-existing, ongoing contractual relationship with the state). In fact, at least one district court has applied *McClintock* and concluded that, when there is "no such ongoing commercial relationship, there is no First Amendment protection and thus in the absence of such a relationship, a cause of action is not recognized for failure to award a contract in retaliation for exercise of one's First Amendment rights." *Halstead v. Motorcycle Safety Foundation Inc.*, 71 F. Supp.2d 464, 473-74 (E.D. Pa. 1999).

Laudably, the panel in *Lac Vieux I* tried to give the district court some guidance on how to measure the constitutionality of the Detroit ordinance. As the panel admitted, however, "the district court and the parties have provided [us with] little guidance on the question" of the correct standard of constitutional review. *Lac Vieux I*, 172 F.3d at 409. Indeed, in the absence of this guidance, the *Lac*

Vieux I panel looked to cases involving criminal ordinances restricting speech, rather than to *Umbehr* or *O'Hare*, when it suggested the appropriate level of review. *Id.* at 409-10 (citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382-383 (1992), in which a criminal defendant challenged an ordinance prohibiting bias-motivated disorderly conduct, and *Frisby v. Schultz*, 487 U.S. 474, 481 (1988), in which abortion protestors challenged an ordinance prohibiting picketing near an individual dwelling).

On remand, the district court struggled to reconcile the panel's reference to strict scrutiny with the Supreme Court's recognition in *Umbehr* and *O'Hare* of the circumscribed nature of the right at issue in these circumstances. The district court did so by finding that the right rested at the fringes of any strict scrutiny concern and that the level of review should be more deferential to the state than normally required when strict scrutiny applies. While as the majority concludes, that approach may be inappropriate, it is understandable given the obvious tension between the strict scrutiny reference in *Lac Vieux I* and the Supreme Court's contrary holdings in *Umbehr* and *O'Hare*.

While the majority is correct that strict scrutiny is not flexible enough to support the district court's conclusion on remand, I believe that, by accepting strict scrutiny as the standard to be applied in this case, the majority is committing error and forcing a manifest injustice on the parties. Even worse, I am not at all clear precisely what that injustice might be; the majority opinion does not explain what the district court should actually do, now, on remand. Should it "determine whether the offending provisions are severable from the remainder of the ordinance?" *Lac Vieux I,* 172 F.3d

at 410. Revoke the appellees' licenses? Require the existing multi-million dollar casinos be razed? Hold a trial to measure damages? Hold a trial to determine if the appellant would have secured a license? [2]

With all due respect to the panel in *Lac Vieux I*, and to my co-jurists in the majority who feel bound by *Lac Vieux I*, I believe the standard of constitutional review employed in this case is incorrect. To adopt it puts us at odds with binding Supreme Court precedent and our sister Circuit Courts of Appeals. *See, e.g.*, *McClintock*, 169 F.3d at 815-17; *Shahar v. Bowers*, 114 F.3d 1097, 1102-03 (11th Cir. 1997) (en banc), *cert denied*, 522 U.S. 1049 (1998) ("the [*Umbehr*] Court held that government contractors are protected from termination or failure to renew their contracts for exercising their free speech rights and that the *Pickering* balancing test is the appropriate standard for determining whether a First Amendment violation has occurred"). Indeed, it puts us at odds with prior opinions of this very Court. *See, e.g., Thaddeus-X v. Blatter*, 175 F.3d 378, 392 (6th Cir. 1999) (noting that the *Pickering/Umbehr* test has been "applied in a variety of First Amendment settings," including even "the prison context").

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[2] The *Lac Vieux I* panel concluded that the appellant had carried its *"burden on summary judgment"* of showing it was "ready and able to submit a proposal and that it was willing and able to pay the associated fees." 172 F.3d at 406 (emphasis added). In other words, there existed material questions of fact regarding whether the tribe was ready, willing, and able timely to do what was required to obtain a license. Appellees argue - correctly, it appears to me - that they could still prevail on all pending claims *at trial* if they prove that, in fact, the appellant was *not* ready, willing, and able to meet these requirements.

Accordingly, I dissent, and suggest that this issue might be suitable for further review.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-00067

[Filed April 12, 1999]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff-Appellant,

v.

THE MICHIGAN GAMING CONTROL BOARD, et al,

Defendants-Appellees,

ATWATER ENTERTAINMENT, L.L.C.; GREEKTOWN CASINO, L.L.C.; and FRANK J. KELLEY, ATTORNEY GENERAL, *ex rel* THE PEOPLE OF THE STATE OF MICHIGAN,

Intervenors-Appellees.

On Appeal from
United States District Court
for the Western District of Michigan at Marquette

No. 97-00067
Robert Holmes Bell, District Judge

JUDGES:
Before: NELSON, SILER, and DAUGHTREY, Circuit Judges.

OPINION
MARTHA CRAIG DAUGHTREY, Circuit Judge.

The Lac Vieux Desert Band of Lake Superior Chippewa Indians brought this action, challenging a Michigan state statute and a Detroit city ordinance that govern the development and regulation of casino gambling in Detroit. The plaintiff asserts that both the statute and the ordinance award an unconstitutional preference in the development of casino gambling to two particular parties, Atwater Entertainment and Greektown Casino (intervenors in this case). On appeal, Lac Vieux contests the district court's grant of summary judgment to the defendants on three grounds, contending (1) that the district court erred in determining that Lac Vieux lacked standing to bring its First Amendment and equal protection claims; (2) that the district court erred in determining that the First Amendment is not implicated in this case; and (3) that the district court erred in applying rational basis review in determining the merits of the equal protection claim. We conclude that the district court did err in determining that Lac Vieux lacks standing to challenge the Detroit ordinance, in determining that the First Amendment is not implicated in that legislation, and in applying rational basis review in determining the merits of the equal protection claim. The district court was correct, however, in holding that the plaintiff lacks standing to challenge the state statute. We therefore affirm the judgment of the district court in part,

reverse it in part, and remand the case to the district court for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

The Lac Vieux Desert Band of Lake Superior Chippewa Indians is a federally recognized Indian tribe that operates a casino on its reservation in Gogebic County, Michigan. In 1994, Lac Vieux, in conjunction with several partners, developed a plan to establish a casino in downtown Detroit. At that time, however, off-reservation gambling was not legal in the state of Michigan, and the governor of Michigan declined to approve the project.

Atwater Entertainment and Greektown Casino also proposed to bring gambling to Detroit. In 1994, they secured sufficient signatures to place on the city ballot two ordinance initiatives that, in conjunction, would repeal the prohibition against casino gambling within the city and authorize Atwater Entertainment and Greektown Casino to conduct casino gambling there. They each spent substantial sums of money to promote passage of the initiatives. Detroit voters approved the initiatives in August 1994, but development of casino gambling was still prevented by Michigan state law.

Atwater Entertainment and Greektown Casino subsequently sponsored a state ballot proposal, Proposal E, which provided for an initiated law, the Michigan Gaming Control and Revenue Act, designed to change state law to allow casino gaming in Detroit. Again, they each devoted substantial sums of money to advertise and promote the adoption of Proposal E, which was adopted by the Michigan electorate on November 5, 1996, and was codified as Mich.

Comp. Laws §§432.201, *et seq.*

The initiated act authorized the development and operation of casino projects in Michigan cities where:

(1) the city has a population of at least 800,000 at the time a license is issued;

(2) the city is located within 100 miles of any other state or country in which gaming is permitted; and

(3) a majority of the voters of the local unit of government have expressed approval of casino gaming in the city.

Mich. Comp. Laws §432.202(f). Detroit is the only city that met these criteria. The initiated act also created the defendant Michigan Gaming Control Board and granted this body exclusive authority to authorize state licenses to operate casinos. *See* Mich. Comp. Laws §§432.204(a), 432.205-.208.

Section 432.206(a)(1) of the initiated act provided an exemption from the competitive bidding process at the city level for any license applicant who "was the initiator of any casino gaming proposal submitted for voter-approval in the city in which the casino will be located and the voters approved the proposal." Mich. Comp. Laws §432.206(a)(1).

Section 432.206(a)(3) provided that an applicant must have entered into a development agreement with the city in order to be eligible for a casino license. *See* Mich. Comp. Laws §432.206(a)(3). Section 432.206(b) limited the number of licenses that the Board could grant and provided for further preferential treatment in the licensing process:

No more than three (3) licenses shall be issued by the board in any city. In the event that more than three (3) applicants meet the criteria provided for in Section 6(a) of this Act, licenses shall first be issued to applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

Mich. Comp. Laws §432.206(b). Atwater Entertainment and Greektown Casino were the only entities eligible for both the exemption from competitive bidding and the preference over other applicants.

Lac Vieux initiated this suit against the Board, the City of Detroit, the Mayor, and City Counsel members in February 1997, seeking to have the initiated act declared unconstitutional on the grounds that it impaired an exclusive contractual right; that it violated the takings, equal protection, and due process clauses of the federal and Michigan constitutions; that it violated the state constitution's prohibition against special legislation; and that it constituted an unlawful delegation of legislative authority to the City of Detroit. Atwater Entertainment, Greektown Casino, and the Michigan Attorney General successfully sought to intervene in the case in May 1997.

In the meantime, in order to implement the initiated act, the Detroit City Council adopted an ordinance entitled the Casino Development Competitive Selection Process, which is now codified as Detroit City Code §§18-13-1 *et seq.* This June 1997 ordinance authorizes the Mayor to select three developers to enter into casino development agreements with

the city, and it sets forth the criteria by which these developers must be chosen. *See* Detroit City Code, §§18-13-3; 18-13-5. The City Council must review and approve proposed development agreements. *See* Detroit City Code, §18-13-8.

The ordinance's Statement of Intent indicates that "in selecting developers of casinos, it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City (City Ordinances 15-94 and 16-94), and who actively promoted and significantly supported the State initiative authorizing gaming." Detroit City Code, § 18-13-1. This preference is laid out even more fully in Section 18-13-6, which provides in part that:

(a) In considering proposals and in selecting a prospective developer with whom the Mayor or his designee will negotiate a development agreement, a prospective developer is entitled to a preference if:

(1) its proposal meets the criteria established by this Chapter and by the request for proposals;

(2) it was the initiator of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and

(3) it made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming.

Detroit City Code, §18-13-6. If a developer meets these criteria, then the developer will receive a "more favorable position" in the competitive bidding process. Detroit City Code, §18-13-2. Greektown Casino and Atwater Entertainment are the only developers who could qualify for this preference.

On June 23, 1997, the City of Detroit published the Phase I Request for Proposals and Qualifications pursuant to the ordinance. Detailed proposals and a $50,000 Phase I fee were to be submitted by August 1, 1997. Eleven developers, including Atwater Entertainment and Greektown Casino, submitted timely proposals. Lac Vieux declined to submit a proposal. On August 22, 1997, the Mayor invited seven developers to submit Phase II proposals along with the $ 250,000 Phase II fee. On November 20, 1997, subsequent to the filing of the district court's opinion, the Mayor announced that MGM Grand-Detroit, Greektown Casino, and Detroit Entertainment (Atwater Entertainment/Circus Circus) had been selected.

In the meantime, while the developer selection process was being conducted by the City of Detroit, the state legislature voted to amend Proposal E. The governor signed the amendments into law on July 17, 1997. The amended act restates the criteria that an applicant must meet in order to be eligible to apply for a casino license. As under the initiated act, these criteria include the requirement that an applicant must have "entered into a certified development agreement with the city where the local legislative body enacted an ordinance approving casino gambling." Mich. Comp. Laws §432.206 (1)(b). However, under the Amended act:

A city shall not certify or submit and have pending before the board more than 3 certified development agreements. If an applicant is denied a casino license by the board, the city may then certify a development agreement with another applicant and submit the certified development agreement to the board. Nothing in this act shall be construed to prevent the city from entering into more than 3 development agreements.

Mich. Comp. Laws §432.206 (2). Furthermore, the amended act provides:

No more than three (3) licenses shall be issued by the board in any city. . . . In evaluating the eligibility and suitability of all applicants under the standards provided in this act, the board shall establish and apply the standards to all applicants in a consistent and uniform manner. In the event that more than three (3) applicants meet the standards for eligibility and suitability provided for in subsections (4) and (5), licenses shall first be issued to those eligible and suitable applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

Mich. Comp. Laws §432.206 (3).

Thereafter, Lac Vieux twice amended its complaint. The first amendment addressed the amended act and the ordinance, both of which had been passed subsequent to the filing of the original complaint. In the second amended complaint, Lac Vieux withdrew its due process challenge to the amended act, as well as the claim that the amended act

constituted unlawful delegation of legislative authority. However, the amended complaint set out new First Amendment claims: it alleged that both the amended act and the ordinance violate the free speech and freedom of association clause of the First Amendment to the federal constitution, by awarding preferences to parties "for their political support of a particular side of a controversial political issue." Following the filing of the second amended complaint, the issues before the district court were, as summarized by that court:

> (1) that the Amended act impairs the exclusive contractual right of [Lac Vieux] to operate Class III games of chance in Michigan; (2) that the Amended act destroyed the exclusive right and constitutes a taking in violation of the United States and Michigan Constitutions; (3) that the preferential treatment given to Atwater Entertainment and Greektown in the Amended act constitutes a denial of [Lac Vieux's] right to the equal protection of the laws of the state of Michigan; (4) that the preferences in the Amended act violate the prohibition against special legislation found in Article IV §29 of the Michigan Constitution; (5) that the preferential treatment given to Atwater Entertainment and Greektown in the Ordinance violates [Lac Vieux's] right to equal protection of the laws of the state of Michigan; (6) that the Ordinance deprives [Lac Vieux] of property without due process of law; (7) that the preference in the Ordinance violates the prohibition against special legislation found in Article §29 of the Michigan Constitution; (8) that the preferences found in the Amended act violate the free speech and political association clause of the First Amendment; [and] (9) that the Ordinance violates the free speech and political association clause of the First Amendment.

Subsequently, the district court denied Lac Vieux's motion for summary judgment and granted the motions for summary judgment submitted by the defendants and the intervenors. The district court held that Lac Vieux did not have an exclusive right to operate that would support its contracts, takings, and due process claims, and that it lacked standing to bring its remaining claims, including the First Amendment and equal protection claims. Despite its finding that Lac Vieux lacked standing to bring these claims, the district court found that the First Amendment is not implicated in this case, that the equal protection claims did not survive rational basis review, and that the special legislation claims were meritless. The only issues now raised on appeal are the standing decision and the First Amendment and equal protection claims.

DISCUSSION

I. Standing

Lac Vieux alleges that the district court erred in finding that it lacked standing to assert both its First Amendment and equal protection claims. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). Constitutional limitations on standing require that there must be an actual case or controversy. *See Pestrak v. Ohio Elec. Comm'n*, 926 F.2d 573, 576 (6th Cir. 1991). The Supreme Court set forth the elements necessary for there to be a "case or controversy" in

Lujan v. Defenders of Wildlife, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), as follows:

> The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact--an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal quotation marks and citations omitted).

Prudential limitations dictate that "the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted." *Pestrak*, 926 F.2d at 576.

A. Standing to Bring Equal Protection Claim

1. The Detroit Ordinance

The district court held that Lac Vieux does not have standing to bring its equal protection claim because it has failed to show that it suffered an injury in fact. Specifically, the court held, the plaintiff did not sufficiently allege that it was "ready and able" to submit a proposal in the City of Detroit's competitive bidding process. On appeal, Lac Vieux argues that the district court erred in determining that it was not ready and able, misapplied *Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993), and ignored

crucial evidence. We agree.

In *Associated General*, an association of general contractors challenged an ordinance that awarded preferential treatment to minority business enterprises. The Eleventh Circuit held that the association lacked standing because it did not allege that any of its members would have been awarded a contract but for the challenged ordinance, leading the court to conclude that there was no injury in fact. *Id.* at 664. The Supreme Court reversed the Court of Appeals, holding that:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit. ... In the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract.

Id. at 666. The Court therefore held that in order to establish standing, "a party challenging a set-aside program like Jacksonville's need only demonstrate that it is *able and ready* to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* (emphasis added). Although this case does not involve a strict set-aside program like that in *Associated General*, the principles set forth in *Associated General* are applicable. Therefore, as the district court correctly noted, "the standing issue hinges on

whether [Lac Vieux] has sufficiently alleged that it is able and ready to bid for a casino license."

Lac Vieux claims it has a demonstrated history of participating in casino development projects and was ready and able to submit a bid. The second amended complaint states:

22. [Lac Vieux] has arranged for the development of major casino resort development projects in the State of Michigan, including a project in conjunction with Full House Resorts, Inc., and GTECH Corporation for the development of a casino resort project in downtown Detroit, Michigan, which included a development in excess of two million (2,000,000) square feet of the former Hudson's Department Store, at a projected cost of Two Hundred Million Dollars ($200,000,000) to Three Hundred Million Dollars ($300,000,000). In addition, [Lac Vieux] has executed the development, finance and construction of a multi-million dollar casino, hotel, fine dining, and golf resort that the Tribe currently owns and operates on its Reservation in Gogebic County, Michigan.

23. At all times relevant herein, [Lac Vieux] has been ready and has had the ability to submit the requisite information for a casino development proposal in accordance with the Request for Proposals/Qualifications issued by the City of Detroit on June 23, 1997, and Section 18-13-1 through 18-13-11 of the Detroit City Code.

However, the district court held that Lac Vieux had *not* sufficiently alleged that it is ready and able to submit a proposal to the City of Detroit. The district court relied on the

fact that the earlier attempt to establish a casino in Detroit had not gone through, that Lac Vieux had partners in that earlier endeavor, that Lac Vieux's experience with its own casino did not demonstrate an ability to address the many requirements of a competitive proposal, that Lac Vieux did not submit a proposal for the court's review, that Lac Vieux had not shown how it would address proposal requirements such as financial stability and compulsive gambling, and that Lac Vieux had not demonstrated a willingness or ability to pay the fees associated with submitting a proposal. We conclude that this analysis was faulty for several reasons.

First, the district court's analysis indicates a misunderstanding of what a plaintiff must show in order to prove that it is "ready and able" to submit a proposal as required by *Associated General*. The grounds relied upon by the district court are evidence of whether a proposal that Lac Vieux might have submitted would ultimately have been successful. They are not indicative of whether Lac Vieux had the capability simply *to submit* a proposal. Under *Associated General*, Lac Vieux "need not allege that [it] would have obtained the benefit but for the barrier in order to establish standing." *Associated General*, 508 U.S. at 666. Lac Vieux therefore need not allege that it would have been awarded a contract but for the preferential and thereby allegedly unconstitutional selection process, but only that it was capable of submitting a proposal. Although the district court did state that it had "not required [Lac Vieux] to show that it would have been selected, rather [Lac Vieux] has only been required to show that is ready and able to submit the proposal in question," the court's analysis belies this assertion.

Second, the district court's finding that Lac Vieux's assertion that it was ready and able to submit a proposal to the City of Detroit "is merely a conclusion without any evidentiary support," is simply incorrect, as is the court's finding that Lac Vieux has not demonstrated a willingness or ability to pay the fees associated with submitting a proposal. The record includes an affidavit by Tom Kolinsky, the Executive Director for the Lac Vieux Desert Band of Lake Superior Chippewa Indians, submitted as an exhibit to Lac Vieux's brief in support of its motion for summary judgment, in which Kolinsky testifies that based upon his knowledge of Lac Vieux's financial and other resources, and based upon his personal knowledge of the position of the Tribal Council:

a. At all times relevant herein, the *Tribe was, and is, ready, and has the ability to submit a proposal* in accordance with the Development Ordinance and Request for Proposals/Qualifications issued by the City of Detroit on June 23, 1997, containing all the information requested therein, including, but not limited to: the Tribe's background and experience in the operation of a casino; a plan for a design for a casino which is compatible with the City of Detroit; a plan for economic development for the City of Detroit; a plan that addresses the necessary infrastructure improvements associated with a casino development in the City of Detroit;. a plan for dealing with social issues related to gambling associated with a development of a casino in Detroit, Michigan, and the Tribe's financial strength and backing.

b. *The Tribe has adequate financial resources to pay the fees* required in connection with the selection process contained in the Phase I Request for Proposals/Qualifications and Phase II Request for Proposals/Qualifications, including

the Fifty Thousand Dollar ($ 50,000) fee to be submitted by Phase I proposers in connection with submitting a Phase I proposal and a Two Hundred Thousand Dollar ($ 250,000) fee to be paid by Phase II proposers in connection with submitting their Phase II proposals.

c. *But for the preferential treatment* given to Atwater Entertainment and Greektown in the Amended Act and Development Ordinance, *[Lac Vieux] would have submitted a proposal* for a casino development project in the City of Detroit.

(Emphasis added.) Given that these facts are not contradicted by any evidence presented by the defendants or the intervenors, we conclude that this affidavit is sufficient to meet the plaintiff's burden on summary judgment. The evidence shows that Lac Vieux was ready and able to submi a proposal and that it was willing and able to pay the associated fees.

Finally, the district court seemed to be under the impression that in order for Lac Vieux to meet *Associated General*'s "ready and able" requirement, it must be able and ready to submit a proposal *immediately*. The district court suggested, for example, that Lac Vieux should have submitted a proposal for the district court's review. Although such a submission would certainly have established that Lac Vieux was able and ready to submit a proposal, it was not mandatory. The parties agree that it would require substantial time and expense to prepare the type of proposal foreseen by the Phase I Request for Proposals and Qualifications, no less by Phase II. The law recognizes, however, that a plaintiff need not make costly futile gestures simply to establish

standing, particularly when the First Amendment is implicated. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988) (holding that injury in fact was established where plaintiffs would have had to take "significant and costly compliance measures or risk criminal prosecution" if their interpretation of the statute is correct); *Clements v. Fashing*, 457 U.S. 957, 962, 73 L. Ed. 2d 508, 102 S. Ct. 2836 (1982) (holding that there was a case or controversy where plaintiffs "alleged in a precise manner that, but for the sanctions of the constitutional provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision"). It is therefore sufficient that Lac Vieux has shown that it could have submitted a timely proposal and that it was still ready to do so, should the preference be struck down and the bidding process started over.

For all these reasons, we conclude that Lac Vieux has standing to bring its equal protection claim in regard to the city ordinance.

2. The Amended Act

The district court did not address Lac Vieux's standing to bring an equal protection claim against the amended act as a separate issue from Lac Vieux's standing to bring an equal protection claim against the city ordinance. Although the same principles governing standing to challenge the ordinance would apply to an equal protection claim against the amended act, it is not necessary to go through that analysis here because the amended act appears to render the preference ineffective. If the preference is ineffective, then there can be no injury and no "case or controversy." Although Lac Vieux

attempts to rebut the defendants' and the intervenors' contention that the preference is ineffective, we find its argument neither fully developed nor convincing. We therefore hold that because the preference in the amended act is ineffective, Lac Vieux does not have standing to bring an equal protection challenge to the amended act.

B. Standing to Bring First Amendment Claim

1. The Detroit Ordinance

Lac Vieux presents a facial challenge to the city ordinance and the amended act on the basis that they grant preferences to particular entities as a reward for content-based political speech. Lac Vieux asserts that under the standing principles set forth in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988), and other First Amendment cases, it need not have participated in the competitive bidding process to bring a facial challenge. The defendants and intervenors disagree and argue that the First Amendment is not implicated. Furthermore, they argue that even if the First Amendment is implicated, the principles enunciated in *Plain Dealer* do not apply in this case and that a facial challenge is inappropriate. The district court found that neither the act nor the ordinance implicates the First Amendment and therefore did not address standing in the First Amendment context, concentrating instead on Lac Vieux's standing to bring its equal protection claim. We conclude that this is indeed a First Amendment case, and we therefore find it necessary to address the standing issue as it applies in the First Amendment context separately from Lac Vieux's standing to bring its equal protection claim.

"In the First Amendment arena . . . especially when there is a possibility that, rather than risk punishment for his conduct in challenging the statute, [an individual] will refrain from engaging further in the protected activity, courts have been willing to relax prudential standing limitations and permit a third party to assert the rights of a person not otherwise before the court. Even in such situations, however, a court must still consider whether the third party has sufficient injury-in-fact to satisfy the Article III case-or-controversy requirement." *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 718 (6th Cir. 1995) (internal quotes and citations omitted). Lac Vieux has standing to bring a First Amendment claim because it established the elements set forth in *Lujan* as necessary to show a "case or controversy" and overcome constitutional limitations on standing. As discussed above in the context of Lac Vieux's equal protection claim, Lac Vieux's injury in fact is the disadvantage it faced in the bidding process because it did not support a particular side of a particular political issue.

Furthermore, given the First Amendment context here, a facial challenge is appropriate, and any need for Lac Vieux to participate in the allegedly unconstitutional bidding process in order to establish standing is obviated. *See Plain Dealer*, 486 U.S. 750 at 755-56, 108 S. Ct. 2138, 100 L. Ed. 2d 771 ("When a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."). The case now before us does not involve the typical licensing scheme envisioned by the Court in *Plain Dealer*, but it is certainly analogous and, therefore, helpful to our analysis. Although typical licensing

schemes often involve prior restraint, which in its common form is not an issue in this case, both licensing regulations and the legislation before this court impose a burden on certain individuals or entities based on the content of their speech. It is this type of burden - a burden that is based on the content of one's speech and, thus, may have a chilling effect on that speech - with which the Supreme Court in *Plain Dealer* was particularly concerned:

> We have previously identified two major First Amendment risks associated with unbridled licensing schemes. [One of those is] self-censorship by speakers in order to avoid being denied a license to speak. ... It is when statutes threaten these risks to a significant degree that courts must entertain an immediate facial attack on the law. Therefore, *a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech* by suppressing disfavored speech or disliked speakers.

Id. at 759 (emphasis added).

The ordinance does create a substantial risk that parties will self-censor, thereby chilling speech. In this case the "chilling effect" arises because the statute limits the ability of persons or entities to take a particular political position freely, whether that position may be to support or to oppose a particular proposal or to remain neutral, without fear of being burdened in a subsequent bidding process for having supported the wrong side, or even for having supported *no* side of the given issue. The Court found in *Plain Dealer* that a facial attack is appropriate and a plaintiff need not actually participate in the licensing or selection process when this type

of chilling effect arises.

Furthermore, the city ordinance does "give[] a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* Pursuant to the ordinance, the Mayor and the City Counsel must grant a preference to certain entities because those entities took a particular view on a political issue. These officials not only have the "power" to discriminate based on the viewpoint of political speech, they are required to do so by law.

We conclude that the principle established in *Plain Dealer* in the context of licensing laws, that a facial challenge should lie when a "law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers," *id.*, also applies in this context, where the statute grants a preference to certain entities because they took a particular view on a particular political issue. Therefore, a facial challenge is appropriate in this case, and the fact that Lac Vieux did not actually participate in the competitive bidding process is not an obstacle to establishing standing.

In addition, prudential concerns also dictate that the court should hold that Lac Vieux has standing to bring a facial First Amendment challenge to the city ordinance. This legislation would award lucrative contracts pursuant to a statute that explicitly provides preferences to entities that provided political support for that statute. Were we to affirm the decision below without granting standing and addressing the merits, it is likely that no other party would have standing

to challenge the ordinance, and the decision below could be interpreted to stand for the proposition that this type of legislation is constitutional.

We therefore hold that Lac Vieux does have standing to bring a facial First Amendment challenge to the ordinance because it was disadvantaged in the bidding process and therefore chose not to participate.

2. The Amended Act

As we noted above in discussing standing in the equal protection context, the language of the amended act seems to render the preference ineffective. Of course, if the preference is ineffective, then there is no injury. Again, we are obligated to recognize that Lac Vieux does not have standing to bring a First Amendment challenge to the amended act. The district court's ruling on this question was therefore correct, if not its reasoning.

II. First Amendment

Lac Vieux argues that the district court erred in finding that the First Amendment is not implicated in this case. Lac Vieux contends that the city ordinance rewarded Atwater Entertainment and Greektown Casino for having engaged in political speech and burdened all other developers for having taken a different political position or for not speaking at all.[3] The defendants and intervenors argue that the

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[3] The district court's opinion significantly misconstrues Lac Vieux's First Amendment claim. The district court's opinion states that "Lac Vieux appears to allege that it fought against

preferences embedded in the ordinance are "merely economic incentive provisions," and that they do not implicate the First Amendment.

The law is clear that a regulation, such as the city ordinance at issue here, may implicate the First Amendment even if the regulation does not directly prohibit or limit speech. *See Laird v. Tatum*, 408 U.S. 1, 11, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972) ("Constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."). Furthermore, the government "may not deny a benefit to a person on a basis that infringes his constitutionality protected interests -- especially his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). This principle has recently been reaffirmed by the Supreme Court in *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 135 L. Ed. 2d 874, 116 S. Ct. 2353 (1996), and *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996).

Although the city ordinance in this case does not directly prohibit or limit speech, it does implicate the First

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gambling in Detroit" and the district court's analysis relies heavily on the fact that this claim is not supported in the record. The court notes that the record does not indicate "a specific or general opposition" to the initiatives by Lac Vieux, and therefore concludes that there is "no basis in the record for saying that [Lac Vieux] was discriminated [sic] based upon its political viewpoint or speech." In fact, Lac Vieux contends that it was discriminated against not for opposing the initiative but for failing to actively promote or significantly support the initiatives.

Amendment. The ordinance grants benefits and imposes burdens according to whether an individual or entity sufficiently supported a particular political issue. Specifically, it grants a preference to developers who initiated a prior local casino gaming proposal and "actively promoted and significantly supported a state initiative authorizing gaming."[4] Detroit City Code §18-13-6. The ordinance thereby denies a preference in the bidding process to certain developers on the basis of the content of their political speech, a category of speech which has been specifically recognized by the Supreme Court as particularly valuable and thereby carefully protected. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976). It does not matter that the ordinance involves prior speech rather than prospective speech or a preference rather than a guarantee, because it imposes a burden based on the content of political speech and, therefore, implicates the First Amendment.

The First Amendment does not, however, preclude all regulation of speech. The right to free speech must be weighed against government and public interests. The appropriate test to be applied in conducting this balancing depends on the type of regulation at issue. When speech is regulated because of its content, that regulation will be subject to strict scrutiny review, unless the speech falls within certain unprotected categories of speech. *See R.A.V. v. City of St.*

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[4] This preference comes into play three times in the course of the competitive bidding process: during the design of the Request for Proposals by the City, during the Mayor's evaluation of the proposals, and during the city council's review of the mayor's determination.

Paul, 505 U.S. 377, 382-383, 403, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992). Under strict scrutiny review, the government bears the burden of showing that its regulation is "necessary to serve a compelling state interest" and that it is "narrowly drawn to achieve that end." *Id.* By contrast, when the regulation in question is intended to further some other interest, and only incidentally interferes with free speech or free expression, the regulation will be subject to a lesser standard of review. Time, place, and manner restrictions, for example, would fall within this second category of regulation. *See Frisby v. Schultz*, 487 U.S. 474, 481, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988) (quoting *Perry Local Educators' Assn*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)).

Although the district court and the parties have provided little guidance on the question, principally because the district court did not reach this issue, we conclude that the ordinance is content-based and is therefore subject to strict scrutiny. The government must therefore show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Precisely because the district court found that the First Amendment was not implicated and never reached this level of analysis, the defendants have not had the opportunity to make a showing that this regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. We therefore remand this case to the district court for further proceedings. We note that if the preference provisions are held to be unconstitutional, the district court will need to determine whether the offending provisions are severable from the remainder of the ordinance.

III. Equal Protection

Lac Vieux claims that the ordinance, by awarding preferential treatment to Atwater Entertainment and Greektown Casino because of the content of their political speech, denies Lac Vieux the equal protection of the laws of Michigan, in violation of the Fourteen Amendment to the United States Constitution and Article I, Section 2 of the Constitution of the State of Michigan. On appeal, Lac Vieux alleges that the district court erred in applying rational basis review in determining the merits of the equal protection claim.

A statute challenged on equal protection grounds will be subject to strict scrutiny when the statute involves a "suspect" classification or has an impact on a "fundamental" right. *See Clark v. Jeter*, 486 U.S. 456, 461, 100 L. Ed. 2d 465, 108 S. Ct. 1910 (1988) ("Classifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny."). If the statute does not involve a suspect classification or affect a fundamental right, then it will be subject to rational basis review. *See Heller v. Doe*, 509 U.S. 312, 319-20, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.").

The district court found that the ordinance did not implicate the First Amendment, or any other fundamental right for that matter, and therefore applied rational basis

review. However, in view of our holding that the ordinance does affect rights under the First Amendment, it follows that it is subject to strict scrutiny review - because it implicates a constitutionally protected fundamental right, the right to freedom of speech. *See Carey v. Brown*, 447 U.S. 455, 461-62, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."); *Chicago v. Mosley*, 408 U.S. 92, 99, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972) ("Because picketing plainly involves expressive conduct within the protection of the First Amendment, discriminations among pickets must be tailored to serve a substantial governmental interest."); *Williams v. Rhodes*, 393 U.S. 23, 31, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968) ("'Only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'") (quoting *NAACP v. Button*, 371 U.S. 415, 438, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963)).

As in the First Amendment context, however, the defendants have not had the opportunity to try to show that the ordinance meets this test. We thus direct that the district court address this issue on remand.

CONCLUSION

For the reasons set out above, we conclude that the district court's judgment must be AFFIRMED in regard to the denial of standing to bring First Amendment and equal protection challenges to the amended act, but REVERSED as

to standing to bring First Amendment and equal protection challenges to the city ordinance. We also REVERSE the judgment as to the merits of both the First Amendment and equal protection claims and REMAND the case for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 2:97-CV-67
[Filed October 31, 1997]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, THOMAS DENOMME, MICHAEL STACEY, PAULA BLANCHARD, RICHARD DAVIS, and KAREN BATCHELOR FARMER; and THE CITY OF DETROIT, MICHIGAN, DENNIS W. ARCHER, MARY ANN MAHAFFEY, GIL HILL, CLYDE CLEVELAND, SHEILA COCKREL, BRENDA M. SCOTT, NICHOLAS HOOD, III, ALBERTA TINSLEY-WILLIAMS, MEL RAVITZ, and KAY EVERETT,

Defendants,

ATWATER ENTERTAINMENT, L.L.C.;)
GREEKTOWN CASINO, L.L.C.; and)
FRANK J. KELLEY, ATTORNEY)
GENERAL, *ex rel* THE PEOPLE OF)
THE STATE OF MICHIGAN,)
)
Intervenor/Defendants.)
_____)

JUDGES:
ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

OPINION

The underlying action in this case filed by Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD") is a challenge to the constitutionality of a state statute and city ordinance, which allow for casino gambling in the City of Detroit and provide the manner by which the licenses to operate casinos will be issued. The state statute is the amended form of a ballot proposal, Proposal E, which was passed by the voters of the State of Michigan on November 5, 1996. The Defendants in this matter are the Michigan Gaming Control Board ("MGCB") and its individual members, the City of Detroit, the Mayor of Detroit, and the individual members of the Detroit City Counsel. The MGCB was created by Proposal E. The Intervenor Defendants are Atwater Entertainment L.L.C. ("Atwater"), Greektown Casino, L.L.C. ("Greektown"), and the Attorney General on behalf of the People of the State of Michigan. Atwater and Greektown are casinos which LVD alleges receive an unconstitutional preference under the amended state statute and city ordinance.

I.

A history of the roles of LVD, Atwater, and Greektown with respect to casino gambling in Michigan is necessary to understand the contours of this case. In July 1990, a number of Michigan Indian tribes ("Tribes"), including LVD, filed a complaint in the United States District Court for the Western District of Michigan against the State of Michigan claiming that the State had failed to negotiate a gaming compact in good faith pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §2710(d)(3)(A). In August of 1993, the parties reached an agreement and requested the Court to enter a Consent Judgment.

The Consent Judgment provided in part that, "each tribal party to the stipulation shall make semi-annual payments to the Michigan Strategic Fund of the State of Michigan in the amount equal to eight percent (8%) of the net win at each casino derived from all class III electronic games of chance..." *Saul Ste. Marie Tribe of Chippewa Indians et al. v. Engler*, 93 F. Supp. 2d 850, No 1:90-CV-611, Consent Judgment at P4.

The Consent Judgment further explained the duration of the Tribes' obligation to make payments to the Michigan Strategic Fund:

> The tribes' obligation to make the payments provided for in paragraph 4 of this Consent Judgment shall apply and continue only so long as there is a binding class III compact in effect between each tribe and the State of Michigan which provides for the play of

> electronic games of chance, and then only so long as the tribes collectively enjoy the exclusive right to operate electronic games of chance in the State of Michigan, as they are defined in the said compacts. The operation of electronic games of chance by persons or entities other than the tribal parties to this stipulation shall not violate the tribes' exclusive right to operate said machines so long as said machines: a) reward a player only with the right to replay the device at no additional cost; b) do not permit the accumulation of more than fifteen (15) free replays at any one time; c) allow the accumulated free replays to be discharged only by activating the device for only additional play for each accumulated free replay; and d) make no permanent record, directly or indirectly, of the free replays awarded.

Id. at P5.

Following the approval of the compacts by the Michigan Legislature and the Secretary of the Interior, LVD constructed and began to operate a casino on its Reservation in Gogebic County, Michigan. The status quo as set out in the Consent Judgment was altered with the passage of Proposal E on November 5, 1996. However, prior to that date, Atwater and Greektown had been active in their efforts to bring casino gambling to Detroit. In 1994, Atwater and Greektown obtained sufficient signatures to place two ordinance initiatives on the ballot in the City of Detroit. Both parties sought the adoption of ordinances which repealed Ordinance

29-88, an ordinance prohibiting casino gambling within the City of Detroit, and authorized Atwater and Greektown to conduct casino gambling within the City. On August 2, 1994, the voters of the City of Detroit passed the initiatives. However, at that time, State law did not allow for casino gambling in Detroit.

In 1996, Atwater and Greektown sponsored a state ballot proposal, "Proposal E," which allowed for casino gambling in Detroit. The proposal provided for an initiated law, the Michigan Gaming Control and Revenue Act (the "Initiated Act"). On November 5, 1996, the voters of the State of Michigan passed Proposal E.

The Initiated Act, M.C.L. §432.201 *et seq.*, authorized casino gambling in cities which met the following criteria:

> (1) the city has a population of at least 800,000 at the time a license is issued;
> (2) the city is located within 100 miles of any state or country in which casino gaming is permitted; and
> (3) a majority of the voters in the [city] have expressed approval of casino gaming in the city.

M.C.L. 432.202(f). Detroit is the only city which meets the above listed criteria.

> The Initiated Act set out a definition of the term "development agreement:"

> [A] written agreement between a city and a company naming such company as the designated developer of a casino in the city and covering certain subjects including, but not limited to: approval by the city of the location of the casino; certification by the city that the applicant has sufficient financial resources to construct and open the casino which it proposes to develop; zoning and site plan requirements; utility connection fees; infrastructure improvements; requirements to utilize local businesses and small businesses as suppliers; employment issues; compulsive behavior programs; insurance requirements; conceptual design approval; reimbursement for traffic engineering and other transportation costs; plans for completion of destination attractions either within or outside the casino facility and ancillary development rights; provided that, in no event, shall the cost of all infrastructure and pre-development costs exceed $ 6,000,000.00.

M.C.L. §432.202(j). Section 432.206 of the Initiated Act states that a person must have a development agreement before they can be eligible to apply for a casino license.

The Initiated Act also created the Michigan Gaming Control Board (MGCB), which has the exclusive authority to grant licenses to operate casinos. M.C.L. §§432.204(a), 432.206-.208. The Initiated Act limited the number of licenses which can be issued by the MGCB to three. It also

provided preferential treatment in the bidding process to Atwater and Greektown. The Initiated Act stated:

> No more than three (3) licenses shall be issued by the board in any city. In the event that more than three (3) applicants meet the criteria provided for in section 6(a) of this Act, licenses shall first be issued to applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

M.C.L. 432.206(b). Atwater and Greektown were the only potential applicants who had submitted a casino gaming proposal for voter approval prior to January 1, 1995.

Following the passage of Proposal E, the Tribes, including LVD, notified the Governor that it was their intention to discontinue payments under the Stipulation and Consent Judgment after the effective date of the Initiated Act. The Tribes claimed that the passage of Proposal E caused them to lose their exclusive right to operate electronic games of chance in the State of Michigan, therefore they no were no longer obligated to make payments under the Consent Judgment. The Governor filed a motion to compel the Tribes to comply with the terms of the Consent Judgment. On March 14, 1997, Judge Gibson signed an opinion which focused on when the Tribes lose their "exclusive right to operate." In the opinion, he concluded,

> The Court finds that under the plain, clear, and unambiguous language of the Consent

> Judgment, the Tribes lose their "exclusive right to operate" when the MGCB issues a license to operate a casino to a person or entity other than the Tribes. Thus, until the MGCB issues such a license, the Tribes must make semi-annual payments to the State pursuant to the Consent Judgment.

Saul Ste Marie Tribe of Chippewa Indians v. Engler, No 1:90-CV-611, March 13, 1997 Opinion at p. 11.

On February 25, 1997, LVD filed this action against the MGCB, the individual members of the MGCB, the City of Detroit, the Mayor and City Counsel members. LVD challenged preferences given to Atwater and Greektown under the Initiated Act and claimed that the Initiated Act was unconstitutional because it permitted off-reservation gambling by entities other than the Tribes. LVD sought to have the Initiated Act declared unconstitutional on six different grounds: (1) that it impaired the exclusive contractual right of the Tribes, and LVD, to operate Class III games of chance in Michigan; (2) that the loss of the exclusive right constituted a taking in violation of the Fourteenth Amendment of the United States Constitution and Article X, §2 of the Michigan Constitution; (3) that the preference given to Atwater and Greektown in the Initiated Act denied LVD equal protection of the laws of the State of Michigan in violation of the United States and Michigan Constitutions; (4) that the preference violated the prohibition against special legislation found in Article IV §29 of the Michigan Constitution; (5) that the Initiated Act had deprived LVD of property without due process of law, in violation of the United States and Michigan Constitutions; and (6) that the Initiated Act constituted an

unlawful delegation of legislative authority to the City of Detroit.

In late March and early April 1997, Atwater, Greektown, and the Attorney General on behalf of the People of the State of Michigan sought to intervene as Defendants in this matter. Their motions were granted by this Court on May 19, 1997.

On June 18, 1997, the City Counsel of Detroit adopted an Ordinance entitled the Casino Development Competitive Selection Process. The Ordinance, Detroit City Code §18-13-1 *et seq.*, provides for a preference to Atwater and Greektown:

In selecting developers of casinos, it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City (City Ordinance 15-94 and 16-94), and who actively promoted and significantly supported the State initiative authorizing gaming.

Id. at §18-13-1(i).

Section 18-13-6 explains the preference more thoroughly,

(a) In considering proposals and in selecting a prospective developer, with whom the Mayor or is designee will negotiate a development agreement, a prospective developer is entitled to a preference if:

(1) its proposal meets the criteria established by this Chapter and by the request for proposals

(2) it was the initiator of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and

(3) it made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming.

(b) Notwithstanding any other provision of this Chapter, no more than one preference will be awarded to prospective developers who proposed city Ordinance No 15-94, even if more than one prospective developer claims entitlement to such preference.

(c) Notwithstanding any other provision of this Chapter, no more than one preference shall be awarded to prospective developers who proposed city Ordinance No 16-94, even if more than one prospective developer claims entitlement to such preference.

The Ordinance also set out criteria which the Mayor should consider in selecting applicants. Section 18-13-3 explains that without limiting his discretion, the Mayor should consider the applicant's expertise and experience with other casinos, financial arrangements, financial strength, creativity of design, infrastructure improvement plan, plan to deal with compulsive gambling, and whether the applicant is entitled to a preference. Section 18-13-4 explains that "a prospective developer is not eligible to enter into a development

agreement with the City if: (1) It does not demonstrate to the satisfaction of the Mayor or his designee that it has the character, reputation, experience and financial capability to operate a casino or casino complex in the public interest."

Section 18-13-8(a)(3) sets out the areas which a development agreement must adequately address to receive approval from the Detroit City Counsel. The list includes but is not limited to: the organizational structure of the developer and its affiliates (including officers, directors and owners); the developer's capabilities, experience, and key personnel; the projected budget for financing, design, construction and furnishing the casino; the projected balance sheets; the existing and anticipated sources of financing and whether theses sources are based in Detroit and whether the financial institutions are minority owned; a current detailed financial statement for each casino owned by the developer; the proposed development site; the size of the casino and description of hotels, retail shops, entertainment and recreational facilities; architectural drawings and the identity of the architect(s); floor plans, landscaping, design theme and parking plans; amount of investment the developer will make to promote economic growth and revitalize the district where the casino will be located; investment to create new jobs and attract new businesses and tourists to the City; a plan for assisting current businesses that may experience employee shortages due to the casinos; the manner in which the casino will enhance the City as a desirable location for tourists, conventions, and families; the amount of investment or other contributions the developer will make to promote economic growth and contribute to the revitalization of economically depressed areas of the City other than the area in which the casino is to be located; the developer's plan to market the

casino and its intent to cooperate and consult with the City, Metropolitan Detroit Convention and Visitor's Bureau; a list of key management and other staff; staff training programs; an equal opportunity employment plan focusing on minorities and women; a commitment to hiring construction contractors who agree to include in their construction contracts an agreement to pay prevailing wages and benefits; a commitment to hire contractors who will commit to the goal of hiring Detroit residents and unions that operate apprentice programs; a commitment to purchase goods and services from Detroit-based businesses; a transportation plan; a plan for any anticipated improvements to existing regional sewer and water facilities necessary to serve the casinos; the extent to which the developer is willing to consider contracting with the City of Detroit Public Lighting Department, provided their rates are comparable to competing utilities, a plan for proposed improvements to the City fire and police protection services that would service the casino; plans for providing child care services; plans for enhancing existing services for treatment of compulsive gambling; and plans to ensure that people under the age of twenty-one will not be permitted to gamble or loiter in the casino. *Id.* at §§18-13-8(3)(a) - (dd).

The Ordinance explained that the mayor is to "exercise his discretion in selecting ... the three prospective developers whose proposals are deemed by the mayor to be in the best interest of the city," *Id.* at §18-13-7(a), and "the city counsel will not approve any proposed development agreement unless: (1)... the proposed development agreement is in the best interest of the city." *Id.* at §18-13-8(b).

Pursuant to the Ordinance, on June 23, 1997, the City of Detroit in its "Request for Proposal/Qualifications Phase

One," set a deadline of August 1, 1997, for Phase One applications to be submitted by all prospective developers to the City of Detroit. Eleven developers, including Atwater and Greektown, submitted proposals in accordance with the August 1, 1997, deadline. LVD failed to submit a proposal to the City. After review of the proposals, on August 22, the field of prospective developers was narrowed from eleven to seven.

On July 17, 1997, Governor Engler signed into law seven bills which amended portions of the Initiated Act. The Amended Act at section 432.206(3) reads:

> No more than three (3) licenses shall be issued by the board in any city. A license shall not be issued for a casino to be located on land held in trust by the United States for a federally recognized Indian tribe. In evaluating the eligibility and suitability of all applicants under the standards provided in this act, the board shall establish and apply the standards to all applicants in a consistent and uniform manner. In the event that more than three (3) applicants meet the standards for eligibility and suitability provided for in subsections (4) and (5), licenses shall first be issued to those eligible and suitable applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

1997 P.A. 69, Section 6(3); M.C.L. §432.206(3).

The Amended Act at section 2(i) introduced the concept of a "certified development agreement." A certified development agreement is defined as "a development agreement that has been certified by a city and submitted to the Michigan Gaming Control Board." Section 6(1) of the Amended Act states that "[a] person is eligible to apply for a casino license if all of the criteria are met ... (b) the applicant entered into a certified development agreement with the city where the local legislative body enacted an ordinance approving casino gaming." Section 6(2) further explains,

> A city shall not certify or submit and have pending before the board more than 3 certified development agreements. If an applicant is denied a casino license by the board, the city may then certify a development agreement with another applicant and submit the certified development agreement to the board. Nothing in this act shall be construed to prevent the city from entering into more than 3 development agreements.

1997 P.A. 69, Section 6(2); M.C.L. §432.206(2).

Section six of 1997 P.A. 69 also sets out a number of criteria which an applicant must meet. An applicant is ineligible to receive a casino license if the applicant has been convicted of a felony; has been convicted of a misdemeanor involving gambling, theft, dishonesty, or fraud; has submitted an application under the Act containing false information; is a member of the board; or fails to demonstrate the ability to maintain adequate liability and casualty insurance for the proposed casinos. 1997 P.A. §6(4). Subsection five spells out

a number of criteria the board must consider in deciding to grant a license. These areas of consideration focus primarily on the identities of those who control the applicant, the financial stability of the applicant, the adequacy of the sources of financing for the applicant, and the applicants history in running casinos.

On July 30, 1997, LVD filed a motion for Preliminary Injunction based upon its claim that the preferences set forth in the Amended Act and the City Ordinance violate the Equal Protection Clause of the United States and Michigan Constitutions. In the Preliminary Injunction motion, LVD sought to prevent the City from moving forward with the casino development process and the MGCB from moving forward with the casino licensing process pending a final resolution of this matter. On August 15, 1997, after the Defendants responded to LVD's preliminary injunction motion, LVD withdrew the motion.

Also on July 30, 1997, LVD filed a Motion to Supplement its Complaint for the purpose of incorporating allegations regarding the Amended Act and the Ordinance. On August 18, 1997, LVD filed a "First Amended Complaint." The First Amended Complaint added three more claims for relief: (7) a claim that the Ordinance provides favorable treatment to Atwater and Greektown consequently denying LVD equal protection of the laws of the State of Michigan, in violation of the United States and Michigan Constitutions; (8) a claim that the Ordinance deprives LVD of property without due process of law, in violation of the United States and Michigan Constitutions; and (9) a claim that the Ordinance violates the prohibition against special legislation in Article IV §29 of the Michigan Constitution.

Following the filing of the First Amended Complaint, each of the Defendants and LVD filed motions for summary judgment in this matter. In response to the Defendants' motions for summary judgment, LVD introduced a claim that the preferences in the Ordinance and Amended Act infringe upon their First Amendment rights. On September 22, 1997, LVD filed a Motion for Leave to File a Second Amended Complaint to incorporate its First Amendment claims. In its motion, LVD explained that it was also seeking to withdraw its fifth and sixth claims for relief, the due process challenge to the Amended Act and the claim that the Amended Act constituted an unlawful delegation of legislative authority. On October 22, 1997, prior to oral argument on the cross motions for summary judgment, this Court granted LVD's motion to amend.

As a result, the following eight claims that the Amended Act and Ordinance are unconstitutional are before the Court at this time: (1) that the Amended Act impairs the exclusive contractual right of LVD and the other Tribes to operate Class III games of chance in Michigan; (2) that the Amended Act destroyed the exclusive right and constitutes a taking in violation of the United States and Michigan Constitutions; (3) that the preferential treatment given to Atwater and Greektown in the Amended Act constitutes a denial of LVD's right to the equal protection of the laws of the State of Michigan; (4) that the preferences in the Amended Act violate the prohibition against special legislation found in Article IV §29 of the Michigan Constitution; (5) that the preferential treatment given to Atwater and Greektown in the Ordinance violates LVD's right to equal protection of the laws of the State of Michigan; (6) that the Ordinance deprives LVD of property without due process of law; (7) that the

preference in the Ordinance violates the prohibition against special legislation found in Article IV §29 of the Michigan Constitution; (8) that the preferences found in the Amended Act violate the free speech and political association clause of the First Amendment; (9) that the Ordinance violates the free speech and political association clause of the First Amendment.

A large number of issues have been raised by the parties in their briefs for summary judgment. This Court will consider the issues in the following order: (1) Did the Amended Act violate an exclusive contractual right to operate Class III electronic games of chance in Michigan? (2) Does LVD have standing to raise the claims other than its exclusive contractual rights claims? (3) Does LVD have a viable First Amendment claim? (4) Do the preferences found in the Ordinance and Amended Act survive rational basis review? (5) Do the preferences found in the Ordinance and Amended Act violate the prohibition against special legislation found in Article IV §29 of the Michigan Constitution?

II.

A party moving for summary judgment has the burden of showing that when considering the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," there is no genuine issue as to any material fact and they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Johnson v. United States Postal Service*, 64 F.3d 233, 236 (6th Cir. 1995). The movant may satisfy this initial burden by demonstrating that the non-moving party has failed to introduce sufficient evidence to support an essential element of the cause of action alleged.

Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). If the moving party meets its burden, the party against whom the motion is brought has the burden of proving that a genuine issue of material fact exists for trial. *Celotex*, 477 U.S. at 324-25, 106 S. Ct. at 2553 (1986). Material facts are facts which might affect the outcome of the action under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). When a court makes this determination, inferences to be drawn from the underlying facts must be viewed in the light most favorable to party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). However, the mere existence of a scintilla of evidence in support of the opposing party's motion is not sufficient to create a genuine issue of material fact, instead, an issue is genuine if there is evidence such that a reasonable jury could find for the party opposing summary judgment. *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512; *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 403 (6th Cir. 1992).

III.

LVD claims that the Consent Judgment signed by Judge Gibson, along with the Stipulation signed by the parties, in the case of *Saul Ste. Marie Tribe of Chippewa Indians et al. v. Engler* provide the Tribes with the exclusive right to operate Class III electronic games of chance in Michigan. LVD claims that this exclusive right will last for the duration of the gaming compacts, a period of twenty years. In reliance upon this claim, LVD alleges that the Amended Act impairs its exclusive contractual right, the

Amended Act constitutes a taking of their exclusive right, and the Ordinance deprives it of the exclusive right without due process of law. Before considering the merits of each of the specific allegations, it is necessary to look at the claim upon which these allegations are based. Therefore, the threshold issue is whether the Consent Judgment provides the Tribes with the exclusive contractual right to operate Class III electronic games of chance until the year 2013.

> LVD bases its claim upon paragraph five of the Consent Judgment, which states:
>
> The tribes' obligation to make the payments provided for in paragraph 4 of this Consent Judgment shall apply and continue only so long as there is a binding class III compact in effect between each tribe and the State of Michigan which provides for the play of electronic games of chance, and then only so long as the tribes collectively enjoy the exclusive right to operate electronic games of chance in the State of Michigan, as they are defined in the said compacts. The operation of electronic games of chance by persons or entities other than the tribal parties to this stipulation shall not violate the tribes' exclusive right to operate said machines so long as said machines: a) reward a player only with the right to replay the device at no additional cost; b) do not permit the accumulation of more than fifteen (15) free replays at any one time; c) allow the accumulated free replays to be discharged only

> by activating the device for only additional play for each accumulated free replay; and d) make no permanent record, directly or indirectly, of the free replays awarded.

Consent Judgment at P5.

LVD focuses on the phrase "...shall not violate the tribes' exclusive right to operate said machines so long as..." in claiming that the Consent Judgment provides them with a twenty-year exclusive right. It claims that this provision of the Consent Judgment "can only be understood as meaning that any state-authorized non-tribal operation of electronic games of chance other than those enumerated would be a violation of the exclusive right granted in the Stipulation and Consent Judgment."

The Defendants claim that the Consent Judgment merely recognized that in 1993, only the Indian Tribes were operating and had the right to operate casinos in Michigan. The Consent Judgment stated that the 8% payment only needed to be paid so long as the Tribes were the only persons allowed to conduct casino gambling in Michigan. They further claim that the language of the Consent Judgment indicates that the parties anticipated that at some point persons other than the Indian tribes would be permitted to conduct casino gambling in Michigan.

The Consent Judgment has consistently been interpreted in the manner proposed by the Defendants. In the matter before Judge Gibson, the Tribes' brief in opposition to the Governor's motion to enforce the 8% payment obligation, stated their understanding of paragraph five of the Consent

Judgment. LVD originally joined with the Tribes in the brief, but later withdrew. The Tribes brief stated:

> When the parties negotiated the stipulation and Consent Judgment, they anticipated the possibility that additional electronic games of chance might be authorized. The tribe sought and obtained the State's agreement that should the Tribes cease to enjoy the exclusive right to operate electronic games of chance within the State of Michigan, the 8-percent payment obligation would end.

The Michigan Court of Appeals came forward with a similar interpretation in the case of *Tiger Stadium Fan Club v. Governor*, 217 Mich. App. 439, 553 N.W.2d 7, *app'l denied* 552 N.W.2d 180 (1996). In that case, a senator and the fan club claimed that the 8% payments to the Michigan Strategic Fund, which were to be used by the City of Detroit Downtown Development Authority for use in the construction of a new Detroit Tiger's Stadium, constituted state funds and could not be spent except pursuant to a legislative appropriation. In determining the nature of the funds at issue, the court of appeals reviewed the Consent Judgment and observed:

> We thus conclude that the revenues involved are public funds not subject to appropriation. The Governor's negotiation of the settlement agreement providing for payments to the MSF is akin to his procuring a grant of federal or corporate funds for a specific purpose. In such circumstances, the

Governor, acting as a representative of the state, convinces the grant-making authority that it is in its best interest to donate funds to the state for a particular purpose. That the Governor might have sought the funds for a different or broader purpose is of no moment. The terms of the grant or gift control. In this regard, M.C.L. §21.161; M.S.A. §3.671 concerning grants, gifts, and other donations to the state, is inapplicable. The payments here are gratuitous payments specifically designated for the MSF, not for the state. The MSF is expressly authorized by statute to accept gifts, grants, loans, and other aids. The state gave up nothing: the tribes perceived that it was in their interest to make, in effect, a continuing grant of eight percent of certain revenues as long as the advantageous status quo--exclusive rights to conduct certain gaming activities--is maintained. The negotiated settlement agreement provides for the payment of those revenues to a fund that is authorized to disburse funds to promote economic development throughout the state, including in areas that might themselves be interested in seeing certain local gaming activity, perhaps persuading the citizens and leaders of those areas that there are benefits to be gained from leaving the exclusive right to conduct this gaming activity with the tribes. In short, the payments were not procured by the Governor in exchange for concessions. Rather, they are the tribes' contribution to the MSF to create an

> incentive to preserve the status quo. The Legislature and the Governor, however, are in no way obligated to preserve the status quo.

Id. at 452-53 (emphasis added).

In the *Saul Ste. Marie Tribe* case, Judge Gibson found the Consent Judgment to be clear and unambiguous:

> [T]he Tribes lose the "exclusive right to operate" when some other person or entity receives and may exercise a right to operate the games....Accordingly, the Court finds that under the plain, clear, and unambiguous language of the Consent Judgment, the Tribes lose their "exclusive right to operate" when the MGCB issues a license to operate a casino to a person or entity other than the Tribes.

Saul Ste. Marie Tribe opinion at pp. 9, 11.

LVD claims that the meaning of the Consent Agreement is ambiguous and additional evidence should be considered in order to determine the intent of the parties to the agreement.[1] However, "if the language is unambiguous,

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[1] LVD cites to a number of comments made by Senator Kelly prior to the State Legislature's approval of the Gaming Compacts. For example, Senator Kelly stated "My understanding of this compact is that it would be between the people of the State of Michigan and certain Tribes in the State of Michigan and that the effect of it will be to grant an exclusive proprietary gaming monopoly to those Indian Tribes on that territory outside of

the meaning of the language is a question of law, and the intent of the parties must be discerned from the words used in the instrument." *Taggart v. United States*, 880 F.2d 867, 870 (6th Cir. 1989) (citing *Moore v. Campbell Wyant & Cannon Foundry*, 142 Mich. App. 363, 369 N.W.2d 904, 906 (1985)). In addition,

> If the terms of the release are unambiguous, contradictory inferences become "subjective, and irrelevant," *Cleveland-Cliffs Iron Co. v. Chicago & NW Transportation Co.*, 581 F. Supp. 1144, 1149 (W.D.Mich., 1984), and the legal effect of the language is a question of law to be resolved summarily. *Empro Mfg. Co.*,

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Michigan law." First, the Consent Judgment, upon which LVD bases its exclusive right, is clear and unambiguous and does not provide the exclusive right which LVD claims it possesses. Therefore, "it is unnecessary to search for a different, contradictory meaning in the legislative record." *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 697(1st Cir.) *cert. denied* 513 U.S. 919, 130 L. Ed. 2d 211, 115 S. Ct. 298 (1994) Second to the extent that the statements of Senator Kelly amount to statutory construction of the Consent Judgment, "'statements by individual legislators should not be given controlling effect'; rather, such statements are to be respected only to the extent that they 'consistent with the statutory language.'" *Id.* at 698 (citing *Brock v. Pierce County*, 476 U.S. 253, 263, 106 S. Ct. 1834, 1840, 90 L. Ed. 2d 248 (1986)). Therefore, even if Senator Kelly's comments are viewed as interpreting the Consent Judgment as granting an exclusive contractual right to the Indian Tribes throughout the entire State of Michigan, such a view is contrary to the plain language of the Consent Judgment itself and will not be given controlling effect.

> *Inc. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 [(C.A.7, 1989)]....A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 702 (C.A.11, 1993).

Gortney v. Norfolk & Western Railroad Co., 216 Mich. App. 535, 540, 549 N.W.2d 612 (1996).

The clear and unambiguous wording of the Consent Judgment contemplates that the Tribe would lose their exclusive right to operate casino gambling in Michigan. LVD claims that the Consent Judgment provides for the exclusive right for the duration of the compacts. However, paragraph five of the Consent Judgment refers to the possibility of losing this exclusive right as separate from the effect of the compacts. Paragraph five states in part, "the tribes' obligation to make the payments...shall apply and continue only so long as there is a binding class III compact in effect between each tribe and the State of Michigan..., and then only so long as the tribes collectively enjoy the exclusive right to operate electronic games of chance in the State of Michigan..." (emphasis added). Because the Consent Judgment contemplates the Tribes losing their exclusive right prior to the expiration of the Compacts, it cannot be argued that the Consent Judgment creates an exclusive right for the duration of the same Compacts.

LVD focuses on the "shall not violate the tribes' exclusive right to operate" language found in paragraph five. However, if the phrase "violate the tribes' exclusive right" were viewed as a grant of an exclusive right to the Tribes, the

phrase "and then only so long as the tribes collectively enjoy the exclusive right" phrase would be rendered meaningless. On the other hand, under the interpretation suggested by the Defendants the two phrases at issue can co-exist. "And then only so long as" contemplates a time prior to the expiration of the compacts when someone other than the Tribes would have the exclusive right to operate casinos. "Violate the tribes' exclusive right" explains what types of games do not violate the exclusive right the Tribes enjoyed in 1993, and indicates which types of electronic games would not allow for the Tribes to be relieved of their obligations under the Consent Judgment.

The Consent Judgment is clear and unambiguous and does not provide LVD with the type of right upon which it builds its impairment of contracts, takings, and due process claims. Therefore, summary judgment must be granted against LVD as to claims one, two and five of LVD's Second Amended Complaint.

IV.

The Defendants claim that LVD lacks standing to bring its remaining claims. The key fact upon which their argument is based is that LVD failed to submit a casino proposal to the City of Detroit on August 1, 1997. Eleven proposals were received by the City of Detroit and after considering the proposals, the field of applicants has been narrowed from eleven to seven.

LVD claims that it is ready, willing and able to submit a bid, it has a history of pursuing development and developing casinos, and it is not required to file a proposal when such a

step would be futile.[2] In their Second Amended Complaint, LVD claims:

22. LVD has arranged for the development of major casino resort development projects in the State of Michigan, including a project in conjunction with Full House Resorts, Inc., and GTECH Corporation for the development of a casino resort project in downtown Detroit, Michigan, which included a development in excess of two million (2,000,000) square feet of the former Hudson's Department Store, at a projected cost of Two Hundred Million Dollars ($200,000,000) to Three Hundred Million Dollars ($300,000,000). In addition, LVD has executed the development, finance and construction of a multi-million dollar casino, hotel, fine dining, and golf resort that the Tribe currently owns and operates on its Reservation in Gogebic County, Michigan.

23. At all times relevant herein, LVD has been ready and has had the ability to submit the requisite information for a casino development proposal in accordance with the Request for Proposals / Qualifications issued by the City of Detroit on June 23, 1997, and Section 18-13-1 through 18-13-11 of the Detroit City Code.

Both LVD and the Defendants rely upon the Supreme Court's recent decision in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of*

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[2] LVD bases a number of its standing arguments upon its contention that this is a First Amendment case. Because the First Amendment is not implicated in this case, see Section V, this Court will not address LVD's First Amendment claims at this time.

Jacksonville, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993). In *Associated General*, the Supreme Court explained the doctrine of standing:

> The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992), which itself "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984). It has been established by a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *Lujan, supra*, 504 U.S. at 560, 112 S. Ct. at 2136 (citations, footnote, and internal quotation marks omitted); (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1926, 48 L. Ed. 2d 450 (1976); and (3)

> a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative," *Allen v. Wright, supra*, 468 U.S. at 752, 104 S. Ct. at 3325. These elements are the "irreducible minimum," *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982), required by the Constitution.

Id. 508 U.S. at 663-64, 113 S. Ct. at 2301-02.

In *Associated General*, the Supreme Court dealt with the issue of whether a contractor's association had standing to challenge a municipal ordinance which required that 10% of the amount spent on city contracts be "reserved for minority business enterprises only." Most of the members of the association did not qualify as minority business enterprises. However, the association alleged that many of its members "regularly bid on and perform construction work for the City of Jacksonville" and "'would have ... bid on ... designated set aside contracts but for the restrictions imposed' by the ordinance." *Id.* 508 U.S. at 659, 113 S. Ct. at 2299.

The Court of Appeals found that the association lacked standing to challenge the ordinance, because it "has not demonstrated that, but for the program, any AGC member would have bid successfully for any of these contracts." *Id.* 508 U.S. at 660, 113 S. Ct. at 2300 (quoting 951 F.2d 1217, 1219 (11th Cir. 1992). The Supreme Court reversed the

Eleventh Circuit and found that the association was not required to show that one of its members would have received a contract absent the ordinance. It stated that, "when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.* 508 U.S. at 666, 113 S. Ct. at 2303.

The *Associated General* Court further explained, "a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* The association's allegation that its members regularly bid on contracts in Jacksonville was considered to be sufficient to meet the standing requirements. In the present case, LVD alleges that under the Amended Act and Ordinance, applicants are prevented form competing on an equal basis. Therefore, the standing issue hinges on whether LVD has sufficiently alleged that it is able and ready to bid for a casino license. If LVD fails to do so, it is unable to demonstrate an injury in fact in this matter.

As explained above, an applicant seeking a certified development agreement from the City of Detroit and ultimately a license to operate a casino from the MGCB must meet a number of criteria. In selecting applicants, the Mayor of Detroit should consider the applicants experience in running a casino, the financial arrangements set out by the applicant, the applicant's financial strength, the creativity of the design proposed by the applicant, along with a plan for dealing with the problem of compulsive gambling. In

addition, a proposed development agreement must adequately address a number of criteria before receiving approval from the City of Detroit. These include such topics as projected budgets, projected balance sheets, parking plans, plans to revitalize the area around the casino and economically depressed areas of town, existing and anticipated sources of funding, an equal opportunity employment plan, a transportation plan, and plans for anticipated improvements in the regional sewer and water facilities, just to name a few. LVD did not submit a proposal by the August 1, 1997 deadline.

LVD claims it is ready and able to submit a bid pursuant to the City's Request for Proposals. As evidence, it first cites to its failed attempt, in conjunction with entities called Full House Resorts, Inc. and GTECH Corporation, to establish a casino in Detroit under IGRA. Second Amended Complaint at P22. As a second ground, it refers to the casino and resort which it owns and operates on its Reservation in Gogebic County, Michigan. *Id.* Finally, it concludes that it "has been ready and has the ability to submit the requisite information for a casino development proposal..." *Id.* at P23.

Evidence of an earlier failed endeavor is not evidence that LVD is ready and able to submit a bid to the City of Detroit. The earlier attempt was made with the help of other entities, however, there is nothing in the record that indicates that these entities or any other entity is ready and able to provide LVD with financial assistance in this matter. The fact that LVD runs a resort and casino pursuant to IGRA in Gogebic County, Michigan, goes toward LVD's experience in running casinos. However, this standing alone does not demonstrate the ability to meet all the areas of consideration

spelled out in the Ordinance. In addition, the claim in paragraph 23 that they are ready and able is merely a conclusion without any evidentiary support.

The record before this Court indicates that LVD has failed to sufficiently allege that it is ready and able to submit the proposal in question. It has not submitted a proposal for the Court's review. It has not shown how they would address concerns such as financial stability, funding, compulsive gambling and other concerns. Nor has it shown a willingness or an ability to pay the fees associated with submitting a proposal. LVD has simply stood on the sidelines and failed to participate in the selection process. As a result, it is unable to sufficiently allege an injury in fact in this matter. Therefore, it lacks standing to challenge the preference provisions of the Ordinance and Amended Act. In finding that LVD lacks standing, this Court has not required LVD to show that it would have been selected, rather LVD has only been required to show that it is ready and able to submit the proposal in question.

In addition to its failure to file a proposal, the Court finds that LVD is not in the same position as the contractor's association in *Associated General*. In that case, the plaintiffs were precluded from bidding on the contracts in question. In this case, LVD was not precluded from submitting a proposal. In fact, nine other applicants submitted a proposal to the City by the August 1, 1997 deadline. Likewise, the plaintiffs in *Associated General* had a history of bidding on contracts with the City of Jacksonville. There is no evidence before the Court that LVD has ever submitted a competitive proposal to run a casino or a proposal to run a casino outside the context of IGRA. For these reasons, this Court finds that LVD lacks

standing to bring its remaining claims before this Court. Alternatively, this Court notes that even if LVD had standing, its claims do not survive the Defendants' summary judgment motions.

V.

After the Defendant filed their motions for summary judgment in this matter, LVD introduced its contention that this case is about a violation of their First Amendment rights. LVD's contention that this is actually a First Amendment case is an issue in its equal protection claims, Second Amended Complaint claims three and five; the First Amendment claims themselves, claims eight and nine; and the question of standing. With respect to the equal protection claims, LVD claims that because of the alleged First Amendment issues at stake in this matter, this Court must review the preferences in the Ordinance and Amended Act under strict scrutiny review, not rational basis review. On the issue of standing, LVD claims that it need not apply for license because it is challenging the Amended Act and Ordinance on First Amendment grounds.

LVD claims that this case implicates the First Amendment based upon its allegation that the Ordinance and Amended Act force individuals either to support a political view with which they disagree, casino gambling in Detroit, or to give up their eligibility for preferences. LVD alleges that those who favored the legislation are benefitted, but those who opposed the same are burdened. It further claims that the Ordinance is a financial incentive to support a particular side of a particular political issue.

There are serious difficulties with the factual predicates upon which LVD builds its claim. LVD appears to allege that it fought against casino gambling in Detroit because it did not think that it was a good idea. However, the record indicates that LVD recently thought casino gambling in Detroit was a good idea. In its complaint, LVD claims that, "in conjunction with Full House Resorts, Inc., and GTECH Corporation," it arranged "for the development of a casino resort project in downtown Detroit, Michigan, which included a development in excess of two million (2,000,000) square feet of the former Hudson's Department Store, at a projected cost of Two Hundred Million Dollars ($ 200,000,000) to Three Hundred Million Dollars ($ 300,000,000)." In addition to LVD's recent role in attempting to bring casino gambling to Detroit, there is nothing in the record that indicates a specific or general opposition by LVD to casino gambling in Detroit. Also, LVD has failed to cite to anything in the record that indicates it even opposed Proposal E, the Amended Act, or the Ordinance. Therefore, there is no basis in the record for saying that LVD was discriminated based upon its political viewpoint or speech.

There are other difficulties with the allegations upon which LVD's complaint rests. LVD characterizes the Amended Act and Ordinance as guaranteeing Atwater and Greeektown licenses. The record before this Court indicates that Atwater and Greektown were granted a preference, not a guarantee or an exemption from the selection process. LVD claims that the Ordinance compels political speech and requires a particular viewpoint. However, the preferences given to Atwater and Greektown were given for past activity, including their efforts in placing the issue of casino gambling on the ballot in Detroit and in Michigan, not to compel future

political speech or to require a particular viewpoint. LVD alleges that those who supported the Ordinance were benefitted while those who opposed the Ordinance were burdened. The record before this Court shows that no such line was drawn. The only line drawn in the Ordinance and Amended Act, which were passed by the Detroit City Counsel and the State Legislature of Michigan respectively, is between those who receive a preference, who must still compete in the license selection process, and those who did not receive a preference, who must also compete in the license selection process. This is not to say that the preference does not need to be reviewed, but it does indicate that the preference should not be reviewed under the strict scrutiny standard proposed by LVD.

The cases upon which LVD places its greatest reliance are *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996) and *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996). Both cases involved independent contractors who were directly punished for their political speech in opposition to particular government officials In *Umbehr*, an independent contractor, who had an exclusive six-year contract to haul trash for several cities in the county, criticized the Board of County Commissioners in public meetings and editorials in the local newspaper. He alleged a number of violations against the board including mismanagement of taxpayer dollars. As a result, the Board terminated his contract. The Court found that Umbehr, as an independent contractor, was entitled to protection. However, the decision was limited in nature. The Supreme Court explained,

> Finally, we emphasize the limited nature of our decision today. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we do not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.

Id. 116 S. Ct. at 2352.

O'Hare involved direct retaliation against a contractor based upon political allegiance. O'Hare was a private towing service which had been on the city's list of available towing service contractors. When the mayor requested a campaign contribution, O'Hare's owner refused and supported the mayor's opponent. As a result, O'Hare was removed from the rotation list. The Supreme Court found that the independent contractor was entitled to protection under the First Amendment. Again, the decision was limited, the Court explained "if the government terminates its affiliation with a service provider for reasons unrelated to political association ... there will be no First Amendment violation." *O'Hare*, 116 S. Ct. at 2360-61. Prior to these cases, the law provided little protection for contractors. *See LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983) *cert. denied* 464 U.S. 1044 (1984)(The First Amendment does not prohibit a city from using political criteria in awarding public contracts to independent contractors).

The facts in this case are distinguishable from the facts in *O'Hare* and *Umbehr*. In the present case, LVD did not have an existing contractual relationship with the City of

Detroit. There is no indication that LVD was retaliated against for something it said or a stand it took on a political issue. In fact, there is no evidence that LVD took a stand on the issue of casino gambling in Detroit. There is nothing in the record that indicates that it said anything on the subject of Proposal E, the Amended Act or the Ordinance. The facts upon which LVD bases its allegations are not supported in the record and the case law cited by LVD does not support its claim that this is a First Amendment case. Therefore, summary judgment must be granted against LVD on claims eight and nine, the First Amendment portions of claims three and five, and on the issue of standing.

VI.

Both LVD and the Defendants believe that they are entitled to summary judgment with respect to the equal protection challenges brought by LVD. In the Second Amended Complaint, LVD contends that both the Ordinance and the Amended Act give out preferences to Atwater and Greektown which constitute a denial of LVD's equal protection rights.

The preferential language in the Amended Act is found in M.C.L. §432.206(3), which states in part:

> In the event that more than three (3) applicants meet the standards for eligibility and suitability provided for in subsections (4) and (5), licenses shall first be issued to those eligible and suitable applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which

> the casino will be located and the voters approved the proposal.

However, section 206(2) of the Amended Act further explains, that "A city shall not certify or submit and have pending before the board more than 3 certified development agreements." M.C. L. 432. 206(2).

Because of section 206(2), it does not appear that the preference will come into play before the MGCB. Under the Amended Act, MGCB will be presented with three applications for licenses at which time the MGCB will determine whether the applicants meet the criteria set out in the Amended Act. There is nothing before this Court that indicates that the preference would be exercised and nothing indicating that any "statutory discrimination" will occur under the Amended Act. Consequently, this Court finds that with respect to LVD's equal protection challenge to the Amended Act, the Defendants' motions for summary judgment must be granted.

The preference contained in the City Ordinance provides that "a prospective developer is entitled to a preference if: (1) its proposal meets the criteria established by this Chapter and by the request for proposals" Detroit City Ordinance 18-13-6(a)(1). As discussed above, the Ordinance sets out a number of criteria which the Mayor and City Counsel of Detroit should consider in selecting applicants and approving development agreements. *Id.* at §§18-13-3, 18-13-4, 18-13-8, In addition, the Ordinance gives the Mayor and City Counsel discretion to approve developers and development agreements which are in the best interest of the city. *Id.* at §§18-13-7 and 18-13-8. The second and third

criteria for receiving a preference are "(2) it was the initiator of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and (3) it made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming. *Id.* at 18-13-6(a)(2)-(3).

The standard to be used in evaluating LVD's equal protection challenge to the Ordinance depends upon the type of right at issue. When the legislation is economic in nature and neither a fundamental right or a suspect class is involved, as is the case in this matter, the level of scrutiny is rational basis review. *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2516-17, 49 L. Ed. 2d 511 (1976).

In *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993), the Supreme Court articulated the general principles of rational basis review.

> Rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications*, Inc., 508 U.S. 307, 313, 113 S. Ct. 2096, 2100-2101, 124 L. Ed. 2d 211 (1993).... Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511 (1976) (per curiam). For these reasons, a classification

> neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.

Id. 509 U.S. at 319, 113 S. Ct. at 2642.

The burden is on the party challenging a legislative classification on equal protection grounds, and that burden is "an extremely heavy one." *Borman's v. Michigan Prop. & Cas. Guar. Ass'n*, 925 F.2d 160, 162 (6th Cir.) *cert. denied* 502 U.S. 823, 112 S. Ct. 85, 116 L. Ed. 2d 58 (1991). If a rational relationship exists between the disparate treatment and some legitimate governmental purpose, the legislation must be upheld. *Heller*, 509 U.S. at 320, 113 S. Ct. at 2642. The legislature is not actually required to articulate "the purpose or rationale supporting its classification." *Id.* (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15, 112 S. Ct. 2326, 2334, 120 L. Ed. 2d 1 (1992)). Rather, the classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (quoting *Beach Communications*, 508 U.S. at 315, 113 S.Ct. at 2098)); see also 37712, *Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 622 (6th Cir. 1997). "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* 509 U.S. at 320, 113 S. Ct. at 2643 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 1006, 35 L. Ed. 2d 351 (1973)).[3]

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[3] Similar standards are employed in evaluating an Equal Protection claim made pursuant to Article 2 §1 of the Michigan Constitution. *Fox v. Michigan Employment Security Commission*,

Before applying rational basis review to the case at hand, it is necessary to address two lines of cases upon which LVD relies. First, LVD cites to a number of cases involving discrimination by a state against non-residents and cases involving the infringement of the right to travel. In *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 105 S. Ct. 2862, 86 L. Ed. 2d 487 (1985) the plaintiff challenged a New Mexico statute which provided a $2000 property tax exemption to Vietnam Veterans who resided in New Mexico prior to May 8, 1976. Vietnam Veterans who took up residence after that date were not eligible for the exemption. In *Metropolitan Life Ins. v. Ward*, 470 U.S. 869, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985), out-of-state insurance companies challenged an Alabama law which taxed the out-of-state insurance companies at a rate three to four times higher than domestic insurance companies. These cases dealt with discriminatory preferences to residents at the expense of non-residents. No such allegation is before the Court in this case.

LVD also cites to *Zobel v. Williams*, 457 U.S. 55, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982), where the Supreme Court found that an Alaska law which provided for distribution of money from a state fund to its adult residents based upon years of residence was in violation of the guarantees of the Equal Protection Clause. The preference in the Ordinance does not hinge on the length of time a party has been a resident of the State of Michigan, nor does it impinge on anyone's right to travel. LVD cites to *Zobel* for the

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379 Mich. 579, 153 N.W.2d 644 (1967); *Doe v. Department of Social Services*, 439 Mich. 650, 661, 487 N.W.2d 166 (1992); *City of St. Louis v. MUSTFA Policy Bd.*, 215 Mich. App. 69, 72, 544 N.W.2d 705 (1996).

proposition that a discriminatory reward to long-time residents at the expense of new residents cannot be justified with a "past contribution" argument. However, four of the concurring justices joined by another concurring justice found that to a limited extent recognition and reward of past service may have independent utility to a state and that these types of actions may be "relevant in predicting current ability and future performance." *Id.* 457 U.S. at 70-71, 102 S. Ct. at 2318 (J. Brennan concurring); *Id.* 457 U.S. at 72, 102 S. Ct. at 2319 (J. O'Connor concurring).

LVD cites to a number of dormant commerce clause cases with respect to the application of the rational basis test. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951); *Hunt v. Washington State Apple Advertising Company*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). However, there is no evidence in the record that the preference in the Ordinance is a protectionist measure or impacts interstate commerce. There is nothing in the record to indicate that the preference is an economic barrier protecting local industry against competition from outside of the State. Consequently, neither line of cases applies to the matter before this Court.

The key question before this Court is whether the preference is rationally related to the overall purpose of the legislation. See *New Orleans v. Dukes*, 427 U.S. at 304-305, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511 (1976). There are a number purposes for the Amended Act and Ordinance that have been articulated by the Defendants. Among the purposes referenced by the Defendants are (1) raising revenue for the

State and (2) the economic revitalization of the City of Detroit. These are clearly legitimate governmental purposes.[4]

In the Ordinance, a party is provided a preference, assuming they are otherwise qualified, if they were an initiator of a casino gambling proposal that was approved by the voters of Detroit prior to January 1, 1995 and if they "made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming." A number of bases for the preference have been articulated by the Defendants: (1) the preference rewards those who have made an economic commitment to the City of Detroit, (2) those who were instrumental in bringing casino gambling to Detroit would presumably reinvest profits back into the City, (3) the preference encourages future efforts by individuals to help revitalize cities and to create a new revenue source for the State, and (4) because of their previous efforts in Detroit, these entities have a superior knowledge of the City and will more likely have a better understanding of constituent relationships which may cause them to be more successful in operating the casinos. Because the past efforts in this case may be relevant in predicting future performance and current ability, see *Zobel*, 457 U.S. at 70-71, 102 S. Ct. at 2318 (J. Brennan concurring), and because the relationship between

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[4] Although these are clearly legitimate governmental purposes, it is not the Court's role to determine if the stated purposes will ultimately occur. Whether or not these purposes will ultimately occur remains to be seen. Either way, this is not an issue for a court to determine. Presumably the voters of the State of Michigan, the Michigan Legislature, and the Detroit City Counsel weighed the probability of reaching these objectives when they passed the legislation before them.

the other reasons cited above and the purpose of the legislation in question are rationally related, the Defendants have shown that the preferences pass rational basis review.

In evaluating legislation, this Court's role is not to sit as a superlegislature. This was explained by Judge Posner in a discussion of the *Dukes* case and the case of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1976).

In *Lee Optical*, for example, the state forbade opticians to fit lenses to frames without a prescription from an opthalmologist or an optometrist. In *Dukes*, the City of New Orleans forbade pushcart vendors to peddle food in the French Quarter - unless they had been doing so continuously for the previous eight years. Both measures were protectionist, anticompetitive; the public-interest rationales offered for them were threadbare, almost laughable. Nevertheless the Court refused to invalidate either measure. The Court is unwilling to constitute itself the nation's ombudsman, its court of administrative appeals.

Pontarelli Limousine, Inc. v. City of Chicago, 929 F.2d 339, 341 (7th Cir. 1991). While the Court in writing on a clean tablet might have used criteria such as familiarity with and commitment to the City of Detroit as opposed to providing a preference to two casinos, this is not a court's role. Where, as here, the preference passes rational basis review, a court should not rewrite the Ordinance so that it passes rational basis review more easily. For the reasons stated above, the Defendants' motions for summary judgment as to counts three and five of the Second Amended Complaint must be granted.

VII.

LVD also claims that the Amended Act and Ordinance violate the prohibition against special legislation found in Article IV §29 of the Michigan Constitution by creating an unreasonable and capricious classification of persons who are entitled to special privileges. Section 29 of Article IV states:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

The standard for evaluating the reasonableness of the classification in question is similar to the rational basis standard set out above. In *Rohan v. Detroit Racing Ass'n*, 314 Mich. 326, 22 N.W.2d 433 (1946) the court stated that "the question of classification is primarily for the legislature and is sufficient if it is practical and reasonable. It is not reviewable unless palpably arbitrary." *Id.* at 350-51 (citing *Miller v. Detroit Savings Bank* 289 Mich. 494, 497, 286 N.W. 803 (1939)). For the same reasons that the classification in the Ordinance passes rational basis review, the Court finds that it is not "palpably arbitrary." Therefore, the preference

is not in violation of Article IV §29 of the Michigan Constitution. As a result, this Court must grant the Defendant's motion for summary judgment on claims four and seven of the Second Amended Complaint.

Because the entire case has been dismissed pursuant to the Defendants' motions for summary judgment, this Court will not address the MGCB's contention that the Eleventh Amendment bars a number of claims against the MGCB and its individual members.

For the reasons stated above, the Defendants' motions for summary judgment are granted and the Plaintiff's motion for summary judgment is denied.

An order consistent with this opinion shall be entered.

Dated: October 31, 1997

/s/ _____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 2:97-CV-67

[Filed October 31, 1997]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, THOMAS DENOMME, MICHAEL STACEY, PAULA BLANCHARD, RICHARD DAVIS, and KAREN BATCHELOR FARMER; and THE CITY OF DETROIT, MICHIGAN, DENNIS W. ARCHER, MARY ANN MAHAFFEY, GIL HILL, CLYDE CLEVELAND, SHEILA COCKREL, BRENDA M. SCOTT, NICHOLAS HOOD, III, ALBERTA TINSLEY-WILLIAMS, MEL RAVITZ, and KAY EVERETT,

Defendants,

ATWATER ENTERTAINMENT, L.L.C.;

GREEKTOWN CASINO, L.L.C.; and)
FRANK J. KELLEY, ATTORNEY)
GENERAL, *ex rel* THE PEOPLE OF)
THE STATE OF MICHIGAN,)
)
Intervenor/Defendants.)
)

JUDGES:
ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

ORDER & JUDGMENT

In accordance with the opinion entered this date;

IT IS HEREBY ORDERED that the motions for summary judgment filed by Frank J. Kelley ex. rel. the People of the State of Michigan (docket # 55), the City of Detroit Defendants (docket # 62), Defendants Michigan Gaming Control Board, Denomme, Stacey, Blanchard, Davis and Farmer (docket # 67), Atwater Entertainment Associates L.L.C. and Greektown Casino L.L.C. (docket # 65) are **GRANTED**.

IT IS FURTHER ORDERED that the Plaintiff's motion for Summary Judgment (docket # 69) is **DENIED** and Plaintiff's complaint is **DISMISSED**.

IT IS SO ORDERED.

Dated: October 31, 1997

/s/ _____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:97-CV-67
[Filed December 2, 1999]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, THOMAS DENOMME, MICHAEL STACEY, PAULA BLANCHARD, RICHARD DAVIS, and KAREN BATCHELOR FARMER; and THE CITY OF DETROIT, MICHIGAN, DENNIS W. ARCHER, MARY ANN MAHAFFEY, GIL HILL, CLYDE CLEVELAND, SHEILA COCKREL, BRENDA M. SCOTT, NICHOLAS HOOD, III, ALBERTA TINSLEY-WILLIAMS, MEL RAVITZ, and KAY EVERETT,

Defendants,

ATWATER ENTERTAINMENT, L.L.C.;)
GREEKTOWN CASINO, L.L.C.; and)
FRANK J. KELLEY, ATTORNEY)
GENERAL, *ex rel* THE PEOPLE OF)
THE STATE OF MICHIGAN,)
)
Intervenor/Defendants.)
_____)

JUDGES:
ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians' motion for preliminary injunction (Docket # 121) is **DENIED**.

Date: December 2, 1999

/s/ _____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 2:97-CV-67
[Filed December 2, 1999]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, THOMAS DENOMME, MICHAEL STACEY, PAULA BLANCHARD, RICHARD DAVIS, and KAREN BATCHELOR FARMER; and THE CITY OF DETROIT, MICHIGAN, DENNIS W. ARCHER, MARY ANN MAHAFFEY, GIL HILL, CLYDE CLEVELAND, SHEILA COCKREL, BRENDA M. SCOTT, NICHOLAS HOOD, III, ALBERTA TINSLEY-WILLIAMS, MEL RAVITZ, and KAY EVERETT,

Defendants,

ATWATER ENTERTAINMENT, L.L.C.; GREEKTOWN CASINO, L.L.C.; and FRANK J. KELLEY, ATTORNEY GENERAL, *ex rel* THE PEOPLE OF

THE STATE OF MICHIGAN,)
)
Intervenor/Defendants.)
)

JUDGES:
ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

OPINION

This action is before the Court on a motion for preliminary injunction filed by Plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Lac Vieux"). Lac Vieux seeks an order preliminarily enjoining Defendant City of Detroit from taking any action toward implementing the provisions of the Detroit Casino Development Ordinance, and an order enjoining the Michigan Gaming Control Board from taking any action to license for casino gaming any entity selected pursuant to the Ordinance pending a final decision of this Court on the merits of this action.

I.

This action was originally filed in February 1997 against the Michigan Gaming Control Board ("MGCB") and the City of Detroit (the "City"), challenging the Michigan Gaming Control and Revenue Act (the "Act"), M.C.L.A. §432.201 et seq., and the Detroit City Ordinance entitled the Casino Development Competitive Selection Process (the "Ordinance"), codified at Detroit City Code §18-13-1 et seq. Plaintiff's challenge was based upon the inclusion in the Act and the Ordinance of a preference for those entities that had

supported local and state initiatives authorizing gaming in the City of Detroit.[1] Atwater Entertainment Associates, LLC, and Greektown Casino, LLC, the two entities that qualified for the preference, intervened in the action. In October 1997 this Court granted Defendants' motions for summary judgment and dismissed the case.

Although Plaintiff's complaint contained numerous legal theories, Plaintiff only appealed this Court's rulings on the issues of standing, First Amendment and equal protection. By opinion dated April 12, 1999, the Sixth Circuit affirmed this Court's determination that Plaintiff lacked standing to challenge the Act.[2] Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board, 172 F.3d 397, 400 (6th Cir. 1999). The Sixth Circuit reversed this Court's decision with regard to Plaintiff's constitutional challenges to the Ordinance.[3] Id.

Plaintiff Lac Vieux filed the current motion for preliminary injunction on October 21, 1999. Plaintiff seeks an order preliminarily enjoining Defendants and Intervenors from taking any action toward implementing the provisions of the Ordinance pending a final resolution of the present litigation. Plaintiff also seeks an order enjoining the MGCB

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[1] The Act was amended in July 1997 to eliminate the preference.

[2] On November 18, 1999, a stipulation and order for dismissal was entered, dismissing the State Defendants as parties to this action.

[3] The mandate from the Sixth Circuit was issued on May 10, 1999.

from taking any action to authorize or license for casino gaming any entity selected by the City pursuant to the Ordinance.

II.

The standard to apply in deciding a motion for preliminary injunction is well established:

> When ruling on a motion for a preliminary injunction, a district court must consider and balance four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.

Memphis Planned Parenthood, Inc. v. Sundquist, 175 F.3d 456, 460 (6th Cir. 1999) (quoting Blue Cross & Blue Shield Mutual of ohio v, Columbia/HCA Healthcare Corp., 110 F.3d 318, 322 (6th Cir. 1997) (citations omitted)). These four considerations are factors to be balanced and not prerequisites that must be satisfied. Sandison v. Michigan High School Athletic Ass'n. Inc., 64 F.3d 1026, 1030 (6th Cir. 1995) (quoting In re Eagle-Picher Indus., Inc., 963 F.2d 855, 859 (6th Cir. 1992)).

III.

The first factor for the Court's consideration is Plaintiff's likelihood of success on the merits. In this case, Plaintiff Lac Vieux has demonstrated a strong likelihood of success on the merits of its First Amendment and Equal Protection claims. As the Sixth Circuit explained:

> Although the city ordinance in this case does not directly prohibit or limit speech, it does implicate the First Amendment. The ordinance grants benefits and imposes burdens according to whether an individual or entity sufficiently supported a particular political issue. Specifically, it grants a preference to developers who initiated a prior local casino gaming proposal and "actively promot[ed] and significantly support[ed] a state initiative authorizing gaming." Detroit City Code §18-13-6. The ordinance thereby denies a preference in the bidding process to certain developers on the basis of the content of their political speech, a category of speech which has been specifically recognized by the Supreme Court as particularly valuable and thereby carefully protected. See, e.g., Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). It does not matter that the ordinance involves prior speech rather than prospective speech or a preference rather than a guarantee, because it imposes a burden based on the content of political speech and, therefore, implicates the First Amendment.

Lac Vieux, 172 F.3d at 409 (footnote omitted). The Sixth Circuit concluded that the Ordinance is content-based and is therefore subject to strict scrutiny. Id. at 409-10. "The government must therefore show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id. at 410.

In light of its determination that the Ordinance has an impact on a "fundamental" right, the Sixth Circuit also held that the equal protection challenge is similarly subject to strict scrutiny review. Id. at 410.

The Ordinance's preferences in favor of those who supported the casino initiative will probably not be able to withstand such strict scrutiny. Content-based regulations are presumptively invalid. R.A.V. v. City of St. Paul. Minn., 505 U.S. 377, 382 (1992). As Judge Rosen noted in Barden Detroit Casino. L.L.C.v. City of Detroit, 59 F. Supp.2d 641, 1999 WL 557201 at 658 (E.D. Mich. 1999), overcoming the presumption of invalidity and satisfying the strict scrutiny test presents a "daunting obstacle" for Defendants and Intervenors. The apparent purpose of the preference was to reward supporters of the casino gaming initiative for past economic development efforts or to encourage economic development in the City of Detroit. It does not appear that these are compelling state interests. Neither does it appear that the Ordinance is narrowly drawn to achieve these interests.

Defendants have not attempted to argue the constitutionality of the Ordinance in their briefs.[4] The City did indicate on the record that it disagreed with the Sixth Circuit's analysis and has preserved that argument for appeal. This Court, however, is bound by the Sixth Circuit's analysis. Accordingly this Court finds that Plaintiff has a substantial likelihood of success on the merits of its First Amendment and Equal Protection challenges to the Ordinance.

IV.

Having concluded that Plaintiff has a strong likelihood of success on the merits of its legal claims, the Court turns to a consideration of the remaining three preliminary injunction factors. These factors require the Court to assess the harm that would result to the parties and to the public from the issuance or non-issuance of a preliminary injunction. This is a more fact intensive inquiry involving a balancing of the equities.

Even where a party has a substantially certain likelihood of success on the merits, that alone does not mandate the issuance of an injunction. "The issuance of an injunction is within the court's equitable discretion." Charter Twp. of Huron. Mich. v. Richards, 997 F.2d 1168, 1175 (6th Cir. 1993). "It is not a remedy which issues as of course." Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982) (internal quotations and citation omitted). A federal court "is not mechanically obligated to grant an injunction for every

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[4] In Barden, the City of Detroit conceded the unconstitutionality of the Ordinance for the purposes of the motion before the court. 59 F. Supp.2d at 568.

violation of law." Id. at 313. "[T]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." Weinberger, 456 U.S. at 312 (quoting Yakus v. United States, 321 U.S. 414, 440 (1944)).

"In shaping equity decrees, the trial court is vested with broad discretionary power." Lemon v. Kurtzman ("Lemon II"), 411 U.S. 192, 200 (1973) (plurality opinion). "[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.'" Id. (footnote omitted) (quoting Brown v. Board of Education, 349 U.S. 294, 300 (1955)). "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." Id. at 201.

An analysis of what is necessary, fair, and workable in this case requires the Court to consider first the nature of the injunctive relief Plaintiff is requesting. Plaintiff seeks to halt all further actions leading toward the opening of casinos in Detroit. Plaintiff contends this is a necessary first step toward enabling Plaintiff to get full relief at the conclusion of the case. Full relief, according to Plaintiff, would be the reopening of the bidding process to all on an equal footing, without regard to preferences.

In other words, what Plaintiff ultimately seeks is not only a ruling that the Ordinance is unconstitutional, but a

ruling that would retroactively void the entire selection process such that the City would have to begin a new selection process.

In shaping equitable relief the Court is not required to give its ruling retroactive effect. There is no per se rule of retroactivity in the civil context as there is in the criminal context. American Trucking Ass'ns, Inc, v. Smith, 496 U.S. 167, 198 (1990) (concurring opinion):

> In determining whether a decision should be applied retroactively, this Court has consistently given great weight to the reliance interests of all parties affected by changes in the law. . . .To the extent that retrospective application of a decision burdens a government's ability to plan or carry out its programs, the application injures all of the government's constituents. These concerns have long informed the Court's retroactivity decisions.

Id. at 185-86.

With these considerations in mind, the Court turns to the equities of this case.

A. Irreparable Injury

The Sixth Circuit addressed the harm to First Amendment interests in this case as follows:

> The ordinance does create a substantial risk that parties will self-censor, thereby chilling speech. In this case the "chilling effect" arises because the statute limits the ability of persons or entities to take a particular political position freely whether that position may be to support or oppose a particular proposal or to remain neutral, without fear of being burdened in a subsequent bidding process for having supported the wrong side, or even for having supported no side of the given issue.

172 F.3d at 407-408.

The Supreme Court has held that the loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976). The reason the injury is irreparable is because of the intangible benefits associated with the exercise of First Amendment rights and the fear that persons will be deterred from exercising those rights in the future. United Food & Commercial Workers Union. Local 1099 v. Southwest Ohio Regional Transit Auth., 163 F.3d 341, 363 (6th Cir. 1998).

Constitutional harm, however, is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction. Hohe v. Casey, 868 F.2d 69, 73 (3rd Cir.), cert. denied, 493 U.S. 848 (1989). For example, in this case any chilling effect on Plaintiff's exercise of political speech has already occurred. The selection process is an accomplished fact. Although the Ordinance may arguably have a chilling effect on future political speech in the event of future selections, Plaintiff's current request to delay

the opening of the casinos would not address this hypothetical First Amendment injury. Prevention of the Ordinance's chilling effect on future political speech would be more effectively accomplished through a declaratory judgment than by suspending the opening of the casinos.

The only injury Plaintiff seeks to address through entry of the preliminary injunction is the economic harm Plaintiff claims it suffers as a result of not having been allowed to compete for a casino on an equal footing. This is an economic injury, not a First Amendment injury. The extent of this economic injury depends on practical considerations, such as whether Plaintiff would have had a realistic chance of being selected to develop a casino in Detroit in the absence of the preference.

In the summary judgment opinion of October 31, 1997, this Court determined that Lac Vieux's assertion that it was ready and able to submit a proposal to the City of Detroit was merely a conclusion without any evidentiary support. The Sixth Circuit held that this determination was incorrect.[5] 172 F.3d at 405. In so holding the Sixth Circuit cited at length from the affidavit of Tom Kolinsky, Executive Director of Lac Vieux, submitted in opposition to the motion for

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[5] "[T]he district court's finding that Lac Vieux's assertion that it was ready and able to submit a proposal to the City of Detroit 'is merely a conclusion without any evidentiary support,' is simply incorrect, as is the court's finding that Lac Vieux has not demonstrated a willingness or ability to pay the fees associated with submitting a proposal." 172 F.3d at 405.

summary judgment.[6] Mr. Kolinsky represented that the Tribe

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[6] The Sixth Circuit noted that Kolinsky had testified that based upon his knowledge of Lac Vieux's financial and other resources, and based upon his personal knowledge of the position of the Tribal Council:

> a. At all times relevant herein, the *Tribe was, and is, ready, and has the ability to submit a proposal* in accordance with the Development Ordinance and Request for Proposals/Qualifications issued by the City of Detroit on June 23, 1997, containing all the information requested therein, including, but not limited to: the Tribe's background and experience in the operation of a casino; a plan for a design for a casino which is compatible with the City of Detroit; a plan for economic development for the City of Detroit; a plan that addresses the necessary infrastructure improvements associated with a casino development in the City of Detroit; a plan for dealing with social issues related to gambling associated with a development of a casino in Detroit, Michigan, and the Tribe's financial strength and backing.
>
> b. *The Tribe has adequate financial resources to pay the fees* required in connection with the selection process contained in the Phase I Request for Proposals/Qualifications and Phase II Request for Proposals/Qualifications, including the Fifty Thousand Dollar ($50,000) fee to be submitted by Phase I proposers in connection with submitting a Phase I proposal and a Two Hundred Fifty Thousand Dollar ($250,000) fee to be paid by Phase II proposers in connection with submitting their Phase II proposals.
>
> c. *But for the preferential treatment* given to Atwater Entertainment and Greektown in the Amended Act and Development Ordinance, *[Lac Vieux] would have submitted a proposal* for a casino development project in the City of Detroit.

was ready and had the ability to submit a proposal in accordance with the Ordinance, that the Tribe had adequate financial resources to pay the fees required in connection with the selection process, and that "[b]ut for the preferential treatment given to Atwater and Greektown ... LVD would have submitted a proposal for a casino development project in the City of Detroit." Because the facts recited in the affidavit were not contradicted by any evidence presented by the defendants or the intervenors, the Sixth Circuit held that the affidavit was sufficient to meet the plaintiff's burden on summary judgment. 172 F.3d at 406. The Sixth Circuit determined that "[t]he evidence shows that Lac Vieux was ready and able to submit a proposal and that it was willing and able to pay the associated fees." 172 F.3d at 406.

This Court does not take issue with the Sixth Circuit's determination that this affidavit was sufficient to meet the Plaintiff's burden on summary judgment of showing that it had standing to challenge the Ordinance. However, based upon discovery taken in connection with the current motion for preliminary injunction, it appears that the affidavit of Tom Kolinsky, as well as the nearly identical affidavit of John McGeshick, Tribal Council Chairman, were not factually supportable. The Court has scoured the record to find any evidence that Plaintiff was ready, willing and able to compete for a casino in Detroit, and has come up with nothing. This Court cannot help but conclude that the affidavits were designed to mislead both this Court and the Court of Appeals.

Contrary to the representations in the affidavits, Lac Vieux was never ready and able to submit a proposal in the

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172 F.3d at 405-06 (emphasis added by Sixth Circuit).

casino selection process. Tom Kolinsky has testified that Lac Vieux never began working on the essential exhibits necessary for a Phase I Request for Proposals and Qualifications ("RFPQ"). It never even began to prepare a general concept design for the casino, a general description of the operating and marketing plans for the casino complex, an estimate of the size of the relevant gaming market, a projected budget as to costs, or an estimate of anticipated profits. (Kolinsky dep. 97-102).

As Kolinsky explained, Lac Vieux needed a financial partner if it was to submit a financially viable casino development proposal. (Kolinsky dep. 84). Before the Tribe began preparation of a proposal it was essential for the Tribe to have a partner. (Kolinsky dep. 96). Kolinsky testified that the basic reason Lac Vieux did not submit a proposal in response to the RFPQ was because it had not hooked up with a partner for the project. (Kolinsky dep. at 148-49).[7] See also McGeshick dep. at 57.

Lac Vieux's current chairman, Richard Williams, confirms that the tribe has nothing in the works with respect to a Detroit casino at this time. Gaming in Detroit has not been a part of the tribe's agenda at all. (Williams dep. at p. 16.) He confirmed that the tribe would need a financial partner to fund a casino in Detroit, and he has no idea, at this

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[7] Lac Vieux did have a previously developed plan for a proposed casino that it could have used as a starting point. That plan, part of the Hudson project, was for a significantly smaller casino. Lac Vieux never began to adapt that proposal for the larger scale required for a Detroit casino authorized under the Act because it was essential that the Tribe first had a partner. (Kolinsky dep. at 101-04).

time, as to who would enter into such a partnership with the Tribe. (Williams dep. at p. 23).

Although the Kolinsky Affidavit stated that it was the preference that prevented Lac Vieux from securing a financial partner, this argument is mere speculation. Mr. Kolinsky has admitted that he has no personal knowledge of any entity that declined to be a financial partner because of the preference. (Kolinsky dep at 85-86).

Plaintiff's argument that the preference prevented it from securing a partner is not supported by any evidence of record.[8] It is pure speculation. Plaintiff's failure to secure a financial partner could be attributable to any number of factors, including Plaintiff's lack of ties to the City of Detroit, or Plaintiff's failure to aggressively seek a financial partner.[9]

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[8] Plaintiff has recently submitted the declaration of Tom Acevedo, Chief of Staff for the Mohegan Tribe of Indians of Connecticut. According to Mr. Acevedo, in June 1997, Lac Vieux requested that Trading Cove Associates, manager of the Mohegan Sun Casino, enter into a joint-venture agreement for the purpose of financing and operating a casino project in Detroit. Mr. Acevedo declares that he was informed by Mr. Len Wolman, Chief Executive Officer of Trading Cove Associates, "that because two of the three available developments were subject to preferences contained in Proposal E, Trading Cove Associates was of the opinion that the proposed project was too risky to undertake." (Acevedo Decl. ¶ 14). Because Acevedo's statement regarding the effect of the preference on the issue of joint financing is hearsay, it is not admissible on the issue of whether or not the preference is the factor that deterred others from entering financing agreements with Lac Vieux.

[9] Plaintiff has only identified three entities that it contacted for a joint venture - Trading Cove Associates, Davis Gaming, and Rio Suite Hotel and Casino. Because Rio ultimately submitted an

Plaintiff notes that had it submitted a proposal it would have been required, as Barden was required, to sign an agreement not to challenge the preference.[10] This Court is not suggesting that Plaintiff had to submit a proposal in order to show that it was ready, willing and able to do so. However, in order to justify the drastic relief Plaintiff is seeking, the Court would expect some evidence that Plaintiff has actually been harmed. The Court would expect Plaintiff to demonstrate, at the very least, that it had a realistic interest and ability to submit a viable casino development proposal. Plaintiff has not made such a showing.

Because Plaintiff has not shown that injunctive relief is necessary to prevent any further First Amendment harm, and because there is a lack of evidence that Plaintiff was ready, willing or able to submit a viable casino development proposal, Plaintiff's assertion that it suffered irreparable economic harm by not being able to submit a proposal on an even basis with all other applicants carries very little weight.

B. Substantial Harm to Others and the Public Interest

In contrast to the minimal evidence of harm to Plaintiff, the evidence of the harm to Defendants and the

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RFPQ on its own without a preference, the lack of a preference was apparently not the reason that it declined to enter into a joint venture with Plaintiff.

[10] All developers that responded to RFPQ I were required to execute a Consent and Release, which provided in part that the developer released the City from any claims relating to the RFPQ process and to the selection and evaluation of Proposals. Barden, 59 F. Supp.2d at 648-49.

public that would flow from the issuance of a preliminary injunction is substantial.

The casino development process has been moving steadily forward for the past two and a half years. The selection process began on June 23, 1997, when the City of Detroit published the Phase I RFPQ pursuant to the Ordinance. Detailed proposals and a $50,000 Phase I filing fee were due by August 1, 1997. Eleven Phase I proposals were submitted. On August 23, 1997, the City reduced the eligible candidates to seven developers who were invited to submit a Phase II proposal along with a $250,000 filing fee. On November 20, 1997, the City made its final selection of MGM Grand, Atwater and Greektown as developers for the three casinos.

MGM Grand was licensed and opened its casino at the end of July 1999.[11] Atwater's Motor City Casino is expected to open in early December 1999, and the Greektown Casino is expected to open during the first quarter of the year 2000. (Archer Decl. ¶ 30). MGM currently employs over 3000 employees. The three casinos are expected to employ well over 5,000 full-time equivalent employees and to generate substantial numbers of other jobs in the area. (Archer Decl. ¶ 32).

The City of Detroit has submitted evidence that it would suffer substantial harm if an injunction were issued. The timely opening of the casinos is critical to the City since they will bring thousands of jobs and millions of dollars in tax

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[11] On October 25, 1999, this Court denied Plaintiff's motion to add MGM as a party.

revenues. The City has committed substantial resources in support of the casino development projects. The City has entered into comprehensive development agreements with each of the three selected developers requiring each developer to construct a casino gaming complex, a hotel with a minimum of 800 rooms, restaurants, parking and other amenities. Land had to be acquired through purchase and through eminent domain proceedings, businesses had to be relocated, and a new zoning ordinance had to be adopted. The City has expended funds in property appraisals, land surveys, relocation surveys, business appraisals, infrastructure analyses, and environmental assessments. The total projected cost of the three permanent casinos will exceed $1.8 billion. (Archer Decl. ¶¶ 22, 23 & 28).

Detroit's revenue-sharing allocation from the State has been decreased and the corporate income tax eliminated in reliance on casino revenues. (Archer Decl. ¶¶ 41-42). "Virtually irreversible tax and budgetary changes have been made by the City and State in reliance on the opening of the temporary casinos and the establishment of the permanent casinos." (Archer Decl. ¶ 33).

Both Atwater and Greektown are on the eve of receiving their final clearance from the State and opening their temporary casinos. The casino developers have spent and committed large sums of money toward the development of their casinos. Greektown estimates that it spent over $3 million in the RFPQ process alone, for financing fees and consultants specializing in fields including casino management, urban planning and design, architecture, and community relations. They have had to obtain credit to back the $150 million in bonds. They have expended money in

property acquisition, construction, licensing and training, They have also contracted with numerous vendors and suppliers. Atwater expects to have 3200 employees and Greektown expects to have 2300 employees when they open.

The State has submitted evidence that a delay in the casino licensing process will cause it substantial harm. The State has expended significant resources on investigating the three casinos. The State is also relying on casino revenues for the School Aid fund, and to repay funds borrowed from the State General Fund.

In NewCentury Detroit LLC v. City of Detroit, No. 97-75154 (E.D. Mich. Nov. 6, 1997), Judge Edmunds, in an opinion denying the plaintiff's motion for a preliminary injunction, addressed the harm to the City, the casinos and the public as follows:

> [T]he Court must consider the economic, political, and social costs to Detroit's citizens and to Defendants Atwater and Greektown of halting the casino project. While this harm *is* difficult to measure, the Court confidently concludes that the injury would be substantial. An injunction would affect not only the machinations of City government and local planning bodies, but also the workings of private financial institutions preparing to fund the project, of laborers awaiting construction, of small businesses anticipating economic opportunity, and communities planning for revitalization.

NewCentury, slip op. at p. 6 (emphasis in original). In the two years since Judge Edmunds' opinion, the potential harm has not decreased. The number of entities that would be affected by an injunction has undeniably increased.

In response to the substantial evidence presented hy Defendants, Plaintiff argues that Defendants' injury is merely a delay in the licensing process -- a calculated risk they took in implementing a constitutionally suspect ordinance in the face of this litigation. Plaintiff relies in large part on dicta from Judge Rosen's opinion in Barden questioning the City's reliance on an Ordinance that was under a constitutional cloud.[12]

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[12] Judge Rosen noted in Barden:

> On the other hand, the Detroit Defendants are similarly in no position to claim either the moral or legal high ground. Although the Court expresses no opinion as to whether casino gaming will be the economic boon and panacea for the City that its supporters suggest, the Court finds it deeply troubling, and indeed somewhat reckless, that the City would risk the casino developments--a project showcased as one of the centerpiece of Detroit's rebirth--on an arguably unconstitutional Ordinance and selection process. The record clearly establishes that as early as 1997, the Detroit Defendants were placed on notice of potentially fatal constitutional defects in the selection process by the filing of the Lac Vieux and NewCentury cases.
>
> Rather than taking prudent steps to immediately cure these potential, constitutional deficiencies, the City made a conscious decision to plow ahead, first codifying the questionable preferences in law and subsequently proceeding with the selection and

Although the City's wisdom in staking its economic rebirth on an arguably unconstitutional ordinance might be questioned, it is important to remember that the First Amendment issue presented by this case is an issue of first impression. Plaintiff did not even raise the First Amendment theory until it sought leave to file its seconded amended complaint, and that did not occur until after Defendants had filed their motions for summary judgment. Moreover, two district courts reviewed the First Amendment issue and found no constitutional problem with the Ordinance. See this Court's October 31, 1997, opinion at 24-28; NewCentury Detroit LLC v. City of Detroit, No. 97-75154, slip op. at 10-12 (E.D. Mich. 11/6/97).

The issue of what impact a party's reliance on a statute later ruled unconstitutional should have on a request for injunctive relief was considered by the Supreme Court in Lemon II. In Lemon v. Kurtzman ("Lemon I), 403 U.S. 602 (1971), the Supreme Court reversed the district court's ruling that upheld the constitutionality of Pennsylvania's statutory program to reimburse parochial schools for secular educational services. On remand, the district court denied the plaintiff's request for an injunction prohibiting payments to the parochial schools for the 1970-71 school year. The

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> development process. In essence, the City also "rolled-the-dice," wagering that it would win in the courts. Having now suffered a serious setback with the Sixth Circuit's decision in Lac Vieux, the Court finds it somewhat disingenuous for the City to rely on the doctrine of laches when it had reason to know all along that a grave day of reckoning could well arrive.

Barden, 59 F. Supp.2d at 657.

Supreme Court affirmed this denial of injunctive relief in Lemon II. The Supreme Court, observing that state officials are entitled to rely on a presumptively valid state statute, rejected the argument that the state acted at its own risk when it proceeded to act under the statute despite the constitutional cloud over it. 411 U.S. at 208-09. Although the statute had been under a constitutional cloud from the outset, and although it had ultimately been struck down on constitutional grounds, the Supreme Court found no need to prevent the State from expending the funds it had committed prior to the determination that the statute was unconstitutional. State officials should not be required to "stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall." Id. at 207.

In light of Lemon II, it is clear that the fact that the Detroit City Ordinance was likely to come under constitutional attack does not, in and of itself, show that Defendants acted in bad faith or that they relied on a plainly unlawful statute when they proceeded to make their casino selection under the Ordinance. See Lemon II, 411 U.S. at 207.

"It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." Id. at 203. Here, as in Lemon II, the Defendants' reliance is reinforced by Plaintiff's tactical choice not to press for injunctive relief until the eve of the casinos' opening. Although Plaintiff moved for a preliminary injunction to block furtherance of the casino licensing process in 1997, for some reason unknown to this Court Plaintiff abandoned that request before it was heard by the Court. Phase I of the casino

selection process went to Phase II, and still Plaintiff took no steps to block the selection of the developer or to prevent construction and licensing of the casinos. Plaintiff did not request a stay pending appeal, and neither did Plaintiff seek an expedited appeal. Even after Plaintiff won at the appellate level, Plaintiff did nothing to halt the casino development process. It was not until six months after the Sixth Circuit announced its decision, after one of the casinos had opened, and on the eve of the licensing of the remaining two casinos, that Plaintiff finally asserted its request to halt any further advancement toward the opening of the casinos. Thus, for approximately two years, the casinos, the City and the State were left to operate on the assumption that Plaintiff, while challenging the constitutionality of the Ordinance, was accepting the practical effects of the selections made under the Ordinance. Plaintiff's failure to pursue injunctive relief for two years may well have encouraged the Defendants to incur detriments in reliance upon the completed selection process. See Lemon II, 411 U.S. at 204 (schools may have detrimentally relied on the plaintiffs' tactical choice not to press for interim injunctive suspension of payments 25 during the pendency of the litigation). See also Bylinsky v. City of Allen Park, 169 F.3d 1001 (6th Cir. 1999) (because plaintiffs did not challenge sewer tax until three years after assessment, after bonds were sold and project substantially completed, plaintiff's claims were dismissed on the basis of laches).

Because the MGCB has not yet determined that either Atwater or Greektown is suitable to hold a license, Plaintiff argues that entry of the injunction sought would cause no more harm than would a determination by the MGCB that Atwater and/or Greektown are unsuitable to hold a casino license. Plaintiff "finds it troublesome that Defendants and

particularly the MGCB, find it acceptable to undergo a reselection process in the event that a developer is found unsuitable, yet find it unacceptable to undergo reselection when the entire selection process is unconstitutional, particularly because the Court of Appeals has suggested that the preferences be struck down and the bidding process started over.'" (Lac Vieux Supplemental Memorandum, p. 7)

Plaintiff's argument misconstrues the Sixth Circuit's opinion. Contrary to Plaintiff's representations, the Sixth Circuit has never suggested that this Court should require the bidding process to be started over. The Sixth Circuit merely held that for purposes of establishing standing to make its First Amendment claim, it was "sufficient that Lac Vieux has shown that it could have submitted a timely proposal and that it was still ready to do so, should the preference be struck down and the bidding process started over." 172 F.3d at 406. This language cannot be construed as an instruction from the Sixth Circuit on what relief should be granted.

Moreover, Plaintiff's argument is disingenuous. A negative licensing determination by the MGCB is not comparable to a decision to nullify the entire selection process and to reopen the selection process. The Court cannot simply ignore all of the economic commitments or the actual physical construction and pretend that nothing has occurred in the last two years since the selection of the three developers. While Plaintiff correctly contends that the public shares Plaintiff's interest in compelling Defendants to conform their conduct to the requirements of the constitution, this argument simply begs the question as to how this goal should be accomplished, whether prospectively, through a declaratory judgment, or retrospectively, by nullifying all actions taken under the

Ordinance and beginning anew.

V.

Having considered and balanced the four preliminary injunction factors, the Court is of the firm conviction that the equities in this case require that Plaintiff's request for a preliminary injunction be denied.

Although Plaintiff has shown a strong likelihood of success on the merits of its First Amendment challenge to the Ordinance, Plaintiff has come forward with scant evidence that it has suffered any real harm that would be remedied by the issuance of a preliminary injunction. Because Plaintiff has shown little interest or ability to compete in a Detroit casino enterprise, an injunction would not benefit Plaintiff. It would serve no purpose other than to hurt others, including the casinos and the people of the City of Detroit and the State of Michigan. Furthermore, Plaintiff forfeited any equitable claim for injunctive relief by waiting two and a half years before applying for an injunction, all the while knowing that Defendants were making irreversible commitments toward the building, licensing, and opening of the. three casinos. Finally, it is clear that any harm Plaintiff would suffer from the non-issuance of the preliminary injunction is far outweighed by the substantial harm to the Defendants and the public should the Court halt the timely progression of events leading to the opening of the Detroit casinos. Accordingly, the Court respectfully denies Plaintiff's motion for a preliminary injunction.

An order consistent with this opinion will be entered.

/s/ _____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

Date: December 2, 1999

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:97-CV-67

[Filed July 14, 2000]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, et al.,

Defendants,

JUDGES:
ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff Lac Vieux

Desert Band of Lake Superior Chippewa Indians' motion for partial summary judgment (Docket # 175) is **DENIED**.

IT IS FURTHER ORDERED that the cross-motions for summary judgment filed by Defendants City of Detroit, Greektown and Atwater (Docket #s 178 & 182) are **GRANTED**.

IT IS FURTHER ORDERED that **JUDGMENT** is entered in favor of Defendants and this case is **DISMISSED** in its entirety.

/s/ _____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

Date: July 14, 2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:97-CV-67

[Filed July 14, 2000]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,	)
Plaintiff,	)
v.	)
THE MICHIGAN GAMING CONTROL BOARD, et al.,	)
Defendants,	)

JUDGES:
ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

OPINION

The Detroit casino litigation is again before this Court, this time on cross-motions for summary judgment. Plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Lac Vieux") has filed a motion for partial summary judgment seeking a declaration that the Casino Development Competitive Selection Process Ordinance, Detroit City Code

§§18-13-1, *et seq.* (the "Ordinance"), or portions thereof, violates thc First and Fourteenth Amendments to the United States Constitution. The City of Detroit Defendants and Intervening Defendants Atwater Entertainment Associates, LLC, and Greektown Casino, LLC, have filed cross-motions for summary judgment seeking dismissal of this action in its entirety because it is no longer a proper case for declaratory judgment, or in the alternative, because the Ordinance is not unconstitutional.

This litigation has a protracted history. The Court is hopeful that it will be concluded with this opinion.

I.

Defendants contend that Plaintiff does not have standing to raise the issue of tho constitutionality of the Ordinance because this Court has already found that Lac Vieux has not established that it suffered or is suffering any harm as a result of the preference. See Opinion, December 2, 1999, at 17.

The Sixth Circuit has already determined that Plaintiff does have standing to bring a First Amendment facial challenge to the Ordinance. 172 F.3d at 408. "[L]ac Vieux's injury in fact is the disadvantage it faced in the bidding process because it did not support a particular side of a particular political issue." Id. at 407. Although this Court subsequently determined, on new evidence, that Plaintiff did not suffer any economic injury as a result of the preference, this Court did not find that Plaintiff suffered no First Amendment injury. This Court will not revisit the issue of standing.

II

The Court turns instead to Defendants' contention that Plaintiffs request for a declaratory judgment of unconstitutionality is moot or that this is not an appropriate case for the entry of a declaratory judgment because the preference will never again come into play.

The Declaratory Judgment Act provides that a court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. §2201(a) (emphasis added). 'Since its inception, the Declaratory Judgment Act has been understood to confer on federal court unique and substantial discretion in deciding whether to declare the rights of litigants." Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995), Thc Act has repeatedly been characterized as "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." Id. at 287 (quoting Public Serv: Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 241 (1952)). The Sixth Circuit has enunciated two principal criteria guiding the policy in favor of rendering declaratory judgments: (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Allstate Insurance Co. v. Mercier, 913 F.2d 273, 277 (6th Cir. 1990) (quotation and citation omitted). "[W]hen neither of these results can be accomplished, the court should decline to render the declaration prayed." Id.

Courts have declined to render declaratory relief where the constitutional injury has already occurred and there

is no threat of future harm. For example, in Speer v. City of Oregon, 847 F.2d 310 (6th Cir. 1988), the plaintiff sought declaratory and injunctive relief with respect to the defendants' refusal to put her name on a city election ballot. The court dismissed plaintiffs suit as moot. The court declined to enter a declaratory judgment, noting that since it could not now effect the requested relief, any opinion that the court might render on the underlying dispute would be merely advisory, for plaintiff no longer had any legally cognizable interest in the outcome. Id. at 311. In Saum v. Widnall, 912 F. Supp. 1384 (D. Colo. 1996), the plaintiff alleged she had been targeted for sexual harassment and abuse at the Air Force Academy because of her sex and appearance. She sought a declaratory judgment that her constitutional rights had been violated. Id. at 1393. The court held that because the constitutional injury had already occurred and there was no threat of future harm, declaratory relief was inappropriate because it would only serve to answer a hypothetical question of constitutional law. Id. at 1394.

Defendants contend that a declaratory judgment in this case would serve no useful purpose and would merely provide an advisory opinion on the constitutionality of the Ordinance. The sole subject of the Ordinance was the procedure for selecting the three casino developers. That procedure was completed over two years ago. The only way the Ordinance might come into play in the future is if one of the casino developers should not be licensed or its development agreement is terminated, in which case the City must select a replacement. §18-13-7(b). But even in that eventuality, the preference would not come into play because there are no other developers who qualify for the preference. There is no dispute that Atwater and Greektown are the only developers

who were, or ever could be, qualified for the preference. They were both selected as casino developers over two years ago, Accordingly, the preference in the Detroit Ordinance will never come into play again. Defendants contend that because this Court has ruled that Lac Vieux cannot obtain an injunction that would undo what has already occurred, there is no live controversy remaining with any practical implication, and the Court is being asked to issue a purely advisory opinion regarding past events.

This Court's denial of preliminary injunctive relief is not sufficient, in and of itself, to ticcide the issue as to whether or not declaratory relief is available. "[A] federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." Zwickler v. Koota, 389 U.S. 241,254 (1967). A court is not precluded from granting declaratory relief merely because a plaintiff has failed to demonstrate irreparable injury-a traditional prerequisite to injunctive relief. Steffel v. Thompson, 415 U.S. 4512, 472 (1974). Whether a case presents an abstract question or a "controversy" contemplated by the Declaratory Judgment Act is a question of degree. Golden v. Zwickler, 394 U.S. 103, 108 (1969). The court should consider "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id.

Plaintiff contends that a ruling on the constitutionality of the Ordinance would not be purely advisory. Plaintiff contends that if the Ordinance is declared to be

unconstitutional, that ruling could render any entities selected pursuant to the ordinance ineligible for a casino license under the Michigan Gaming Control and Revenue Act, M.C.L.A. §432.201 et seq. This issue is currently pending before the Michigan Court of Appeals. Lac Vieux v. Mich. Gaming Control Bd., Case No. 224198.(Mich, App.) (application for leave to appeal filed Dec. 21, 1999). Plaintiff contends that if the Ordinance is declared unconstitutional the State could require the City to enact a new ordinance and to initiate a new bidding process.

The amicus brief filed by the Michigan Gaming Control Board ("MGCB") tends to support Plaintiffs assertion that the issue is not moot. The MGCB has requested that if the Court should enter declaratory judgment in favor of the plaintiff, the ruling be expressly made prospective and not retroactive, otherwise there will be confusion among the parties and the MGCB as to the status of existing and pending casino licenses.

It appears to the Court that the constitutionality of the Ordinance is not a moot issue, and that this Court should accordingly exercise its discretion in favor of addressing the merits of Plaintiff's request for declaratory relief.

III.

The Sixth Circuit remanded this action for further proceedings consistent with the Sixth Circuit's opinion, for purposes of addressing the issue of the constitutionality of the Ordinance. Although Defendants disagree with the Sixth Circuit's ruling that the preference implicates the First Amendment, this Court is bound by that ruling and begins this

analysis with a restatement of a portion of the Sixth Circuit opinion:

> Although the city ordinance in this case does not directly prohibit or limit speech, it does implicate the First Amendment. The ordinance grants benefits and imposes burdens according to whether an individual or entity sufficiently supported a particular political issue. Specifically, it grants a preference to developers who initiated a prior local casino gaming proposal and "actively promot[ed] and significantly support[ed] a state initiative authorizing gaming." Detroit City Code §18-13-6. The ordinance thereby denies a preference in the bidding process to certain developers on the basis of the content of their political speech, a category of speech which has been specifically recognized by the Supreme Court as particularly valuable and thereby carefully protected. See, e.g., Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). It does not matter that the ordinance involves prior speech rather than prospective speech or a preference rather than a guarantee, because it imposes a burden based on the content of political speech and, therefore, implicates the First Amendment.

Lac Vieux, 172 F.3d at 409 (foomote omitted). The Sixth Circuit concluded that the Ordinance is content-based and is therefore subject to strict scrutiny. Id. at 409-410. Because the Ordinance affects fundamental rights, Plaintiffs Equal

Protection claim is also subject to strict scrutiny. Id. at 410. "The government must therefore show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id.

Although the Sixth Circuit determined that the Ordinance is a content-based regulation of political speech and is subject to strict scrutiny, it also pointed out that the burden the Ordinance imposes on political speech is indirect, it affects prior speech rather than prospective speech, and its application results in a preference rather than a guarantee. Id. at 409. It is evident that the First Amendment issue posed by the preference is unprecedented and lies at the fringes of the political speech doctrine. As this Court noted in the opinion denying Plaintiffs motion for preliminary injunction, it is an issue of first impression that was not raised until Plaintiff sought leave to filed its seconded amended complaint, and two district courts who reviewed the Ordinance found no constitutional problem. Lac Vieux, December 2, 1999 opinion, at 22-23. With these considerations in mind, the Court undertakes a strict scrutiny of the Ordinance.

Plaintiff contends that if the interest served by the preference is an interest in rewarding Atwater and Greek-town for past economic development efforts, such an interest cannot constitute a compelling state interest. In support of this argument Plaintiff cites Zobel v. Williams, 457 U.S. 55, 63 (1982), where the Court held that the State's objective of rewarding citizens for past contributions was not a legitimate state purpose that would justify discriminating in the distribution of income derived from its natural resources based on tho length of each citizen's residence. Id. at 63. If, on the other hand, the purpose of the preference is to

encourage future economic development, such an interest similarly fails because the Supreme Court has held that encouragement investment is not a strong enough state interest to support a tax that discriminates in favor of in-State businesses. See Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882 (1995).

It apples that Plaintiffs representation of the City's interest in the preference is too narrow. The interest served by the preference was not merely one of rewarding those who had supported past economic development efforts or to encourage future economic development. The Ordinance was part of a substantially larger effort to revitalize the economy and quality of life in Detroit, which had been in a downward spiral for many years. As noted in the Declaration of Dennis Archer, Mayor of the City of Detroit:

> The City of Detroit has suffered from very substantial population loss and economic disinvestment over the last few decades. Its population has declined from approximately 1,850,000 in 1950, to 1,000,000 today. In addition, hundreds of businesses, which provided tens of thousands of jobs arid a secure economic tax base, left the City during this time period.

Archer Declaration, ¶3.

In November 1996, voters in the State of Michigan passed Proposal E, a state-wide initiative which authorized three casinos in the City of Detroit, The Michigan Gaming Control and Revenue Act, M.C.L. §432.201 *et seq.*, imposes

an 18% wagering tax on adjusted gross receipts received by the licensee from gaming. Under the Act 55% of the wagering tax is paid to the City's general fund, and 45% of the wagering tax is paid to the State robe used for educational purposes. M.C.L. §432.212; M.S.A. §18.969(212). Since passage of the Act the City has been working diligently to implement casino gaming because of its importance to the economic revitalization of the City. Archer Declaration, ¶ 4.

Popular support was essential to the success of the City's economic revitalization efforts. Casino gaming has been very controversial in Detroit as well as in thc State of Michigan. It is an emot/onally and politically charged subject. Between 1976 and 1994 Detroit voters rejected five proposals to bring casinos to the City. In 1994, however, City voters passed Proposals B and C which supported two casinos in the City, one in Greektown and another on the Detroit River sponsored by the Atwater Entertainment Group. A key feature of the City's effort to maintain political support for its new tax scheme was to try to insure that the benefits of casino gaming went to Detroit businesses and to Detroit residents. One of the methods of accomplishing this was to provide a preference (a more favorable position) to those developers who had been expressly approved by City voters and who had spearheaded the legalization of casino gaming in Detroit, as long as they also met all of the criteria set forth in the Ordinance and in thc request for proposals. Archer Declaration, ¶6.

The concerns and interests expressed by the Mayor are reflected in the Ordinance Statement of Intent. The Statement of Intent provides that the process of selecting developers of casinos must conform to all applicable laws and procedures

and be independent, impartial and responsible to the people; that the City is committed to providing a fair, objective and comprehensive process to select the designated developers; and that any proposed casino should contribute to the enhancement, expansion and stabilization of employment within the City and the local economy. Detroit City Code, §18- 13-1 (a)-(c). The City Council found that it was in the City's best interest to obtain the highest quality proposals for the development of casinos. Id. at (d). The City Council also found that it was in the City's best interest that any proposals provide new employment opportunities for Detroit residents and serve as a catalyst for economic development in the City; provide for the payment of necessary infrastructure improvements to facilitate the successful operation of casinos and to minimize any negative impact of the development of casinos upon City residents; endeavor to showcase, stimulate, and improve the use of existing and future tourism facilities in the City, and improve upon and increase the benefits of tourism; and provide for the development of a timely, orderly and efficient arrangement of transportation and public facilities and services for Detroit residents and visitors to the City. Id. at (e)-(h). The City Council determined that it was in the City's best interest to provide a preference to those who took the initiative to facilitate the development of casino gaming in the City by proposing a casino gaming proposal approved by the voters of the City and who actively supported the State initiative authorizing gaming. Id. at (i). Finally, the City Council determined that it was in the City's best interest that any development agreements address, among other things, the goals that are identified in the foregoing paragraphs. Id. at (j).

It is clear from the language of the Ordinance and the Affidavit of the Mayor of the City of Detroit that the preference was part of a larger strategy designed to insure that the benefits of gaming inured to the benefit of City businesses and City residents, and to insure and maintain strong public support for casino gaming in the City.

According to Defendants, the City's interest in maintaining a sound taxing system and maintaining political stability and public support to keep that system in place were sufficient to constitute a compelling state interest under strict scrutiny analysis.

This Court agrees. The City of Detroit has elected to rely on casino gaming as an integral part of the City's economic recovery. The City's tax revenues are dependent upon casino revenues. Because casino gaming is a divisive issue, and because public support is essential to the success of the City's new tax system, the City determined that it was important to emphasize the positive benefits of casino gaming and to allay the public's fears associated with casino gaming, such as the fear of the entities associated with gaming and the fear that the positive effects of gaming would not benefit the City. The preference was one manner in which the City could respond to the public's fears by giving an advantage in the selection process to Detroit businesses who had already invested in thc City, who had demonstrated their commitment to the revitalization of the City, and who had already been endorsed by thc Detroit voters to run casinos in the City through the passage of their proposals in 1994.

There is no question that the City has a compelling interest in the maintenance of a sound tax system. The

Supreme Court noted in Hernandez v. Commissioner of Internal Revenue Service, 490 U.S. 680 (1989), that even if §170 of the tax code regarding the deductibility of charitable contributions or gifts imposed a substantial burden on the exercise of religion, that burden would bo justified by the "broad public interest in maintaining a sound tax system." Id., at 699 (quoting Untied States v. Lee, 455 U.S. 252, 260 (1982)).

The City also has a compelling interest in the stability of its political system. In Gable v. Patton, 142 F.3d 940 (6th Cir. 1998), the Sixth Circuit held that the State of Kentucky's Slating provision, which required candidates for governor and lieutenant governor to run in their party's primary as part of a single slate, was a relatively small burden of the right of association, and was justified by the State's compelling interest in preventing factionalism and maintaining political stability, Id. at 946-47. The Court quoted the Supreme Court's observation that "the State's interest in the stability of its political system [is] not only permissible, but compelling." Id. at 947 (quoting Storer v. Brown, 415 U.S. 724, 736 (1974)).

The language of the Ordinance makes it clear that the City' s interest in developing and maintaining public support for its new casino gaming tax scheme is part and parcel of its compelling interest in creating and maintaining political stability and a tax base that would insure the City's economic viability. Granting a preference to those entities was necessary to the accomplishment of the City's compelling objectives.

Plaintiff contends that even if the governmental interests asserted by Defendants are of "compelling

necessity," the Ordinance is not "precisely tailored" to accomplish those interests.

Under strict scrutiny the City bears the burden of showing not only that its ordinance is "necessary to serve a compelling state interest" but also that it is "narrowly drawn to achieve that end." Lac Vieux, 172 F.3d at 409 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83, 403 (1992). "Broad prophylactic roles in the area of flee expression are suspect. Precision ofregulalion must be the touchstone in an area so closely touching our most precious freedoms." Riley v. National Federation of the Blind, 487 U.S. 781, 801 (1988) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

The Casino Development Ordinance provides a preference to those developers who had been expressly approved by City voters as casino developers in ballot proposals prior to 1995 and who spearheaded the legalization of casino gaming in Detroit only if they also meet all of the criteria for casino developers set forth in the Ordinance and the request for proposals.[1] A preference is defined in the

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[1] The Ordinance provides that a prospective developer is entitled to a preference if:

> (1) Its proposal meets the criteria established by this chapter and by the request for proposals;
>
> (2) It was the initiator of a casino gaming proposal which was approved by the voters of this city prior to January 1, 1995 [City Ordinances 15-94 and 16-94]; and
>
> (3) It made significant contributions to the development of gaming within the city by actively

Ordinance as "a more favorable position given to one prospective developer over another" in the selection process. Detroit City Code §18-13-2.

The preference does not guarantee that a preference entity will be awarded the right to develop a casino. All potential developers, including those with a preference, are required by the ordinance to compete head-to-head with all other applicants in a competitive selection process. The Ordinance requires the mayor to select the designated developers for the casinos or casino complexes "by means of a competitive request for proposals process." City Code §18-13-3{a), "The City shall use a competitive selection process to enter into up to three development agreements with designated developers whose proposals are determined in accordance with this chapter to be in the best interest of the City." Detroit City Ordinance §18-13-5. The preference is only one of many criteria to be considered by the Mayor in his selection of the developers. Detroit City Code §18-13-3.[2] A preference entity's proposal, to be considered, must meet the criteria established by the Ordinance and by the request for proposals. §18-I3-6. The Ordinance provides that the overriding principle guiding thc Mayor's decision is the selection of developers whose proposals are deemed to be in

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> promoting and significantly supporting a state initiative authorizing gaming.

Ordinance §18-13-6(a).

[2] The Ordinance lists seven broad criteria to be considered by the mayor in reviewing proposals. These criteria are listed under the captions Background and Experience, Financial, Concept, Economic Development, Infrastructure Improvements, Social, and Preference Qualification. Detroit City Ordinance, §18-13-3.

the best interest of the City. Detroit City Code, §18-13-7(a). The Ordinance specifically confirms that the Mayor can decide not to select a developer who qualified for the preference. Ordinance §18-13-7(a) & §18-13-8.

The Ordinance must be contrasted with the licensing procedures under the Michigan Gaming Control and Revenue Act, before it was amended in 1997, which exempted certain developers from the competitive bidding process altogether. Under the original Act, known as Proposal E, an applicant was eligible for a casino license if it was the initiator of any casino gaming proposal in the City or if the applicant was selected by the City pursuant to a competitive bidding process. M.C.L.A. §432.206; M.S.A. §18.969(206). In contrast to these procedures, the Ordinance requirement that preference entities compete head to head with the other applicants must be seen as "benign and narrowly tailored." See Riley, 487 U.S. at 800.

In light of the indirect and minimal effect this Ordinance has on political speech, the Court finds that the after-the-fact preference given to two entities who had met all competitive criteria for developing a casino, who had demonstrated their commitment to the City, and who had previously been approved by the City's voters to operate casinos in the City, was narrowly tailored to achieve a compelling state interest in revitalizing Detroit economy through casino gaming and in maintaining strong public support for casino gaming in Detroit.

The Court concludes that the Ordinance as enacted is constitutional and survives strict scrutiny analysis. Accordingly, Plaintiffs request for a declaration that the

Ordinance is unconstitutional will be denied, and Defendants' cross-motions for summary judgment will be granted. In light of this ruling the Court need not address the issue of the severability of the preference provisions.

An order and judgment consistent with this opinion will be entered.

/s/ _____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

Date: July 14, 2000

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 2:97-CV-67

[Filed February 7, 2002]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,	)
Plaintiff,	)
v.	)
THE MICHIGAN GAMING CONTROL BOARD, et al.,	)
Defendants,	)

JUDGES:
ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

ORDER

This Court's July 14, 2000, opinion and order upholding the constitutionality of the Casino Development

Competitive Selection Process Ordinance, Detroit City Code §§18-13-1, *et seq.*, (the "Ordinance") and dismissing the action was reversed and remanded by the Sixth Circuit. *Lac Vieux Desert Band v. Michigan Gaming Control Board,* No. 00-1879 (6th Cir. Jan. 11,2002). According to the Sixth Circuit, "the preference renders the ordinance invalid," and "the ordinance in its current form is unconstitutional." *Id.* at 3 & 6. In accordance with the Sixth Circuit's opinion,

IT IS HEREBY ORDERED that Lac Vieux Desert Band's motion for partial summary judgment (Docket # 175) is **GRANTED**.

IT IS FURTHER DECLARED that the Ordinance in its current form is unconstitutional.

IT IS FURTHER ORDERED that the parties shall advise the Court in writing on or before February 22, 2002, what issues, if any, remain for determination by this Court.

/s/ _____
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

Date: February 7, 2002

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 2:97-CV-67

[Filed March 21, 2002]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,	)
Plaintiff,	)
v.	)
THE MICHIGAN GAMING CONTROL BOARD, et al.,	)
Defendants,	)

JUDGES:
ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

ORDER TO SHOW CAUSE

Plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians has filed a motion for further relief

seeking, among other things, a declaration that the current Detroit casino development agreements and casino licenses are unlawful and void, effective January 11, 2002, and an injunction against all casino gaming activity in the City of Detroit.

Under Michigan law casinos must be licensed by the Michigan Gaming Control Board. Eligibility for a casino license requires the applicant to have entered into a certified development agreement with the city where the local legislative body enacted an ordinance approving casino gaming, M.C.L. §432.206.

It appearing that the Sixth Circuit stated in its opinion of January 11,2002, that "the casino licenses Detroit has issued to date are illegitimate," *Lac Vieux Desert Band v. Michigan Gaming Control Board,* 276 F.3d 876, 879 (6th Cir. 2002), accordingly,

IT IS HEREBY ORDERED that Defendant City of Detroit is ordered to **SHOW CAUSE** at a hearing on May 1, 2002, at 3:00 p.m., Courtroom 401, Ford Federal Building, 110 Michigan Ave. N.W., Grand Rapids, MI 49503, why this Court should not enter an order declaring the current casino development agreements and casino licenses to be unlawful and void.

IT IS FURTHER ORDERED that Defendants shall respond to Plaintiff's motion for further relief on or before April 10, 2002.

/s/ _____
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE.

Date: March 21, 2002

APPENDIX H

ORDINANCE NO. 17-97
CHAPTER 18
ARTICLE XIII

RELATIVE TO THE DEFINITIONS AND PROCEDURES FOR THE CASINO DEVELOPMENT COMPETITIVE SELECTION PROCESS.

AN ORDINANCE to amend Chapter 18 of the 1984 Detroit City Code by adding Article XIII, entitled "Casino Development Competitive Selection Process," which shall consist of Sections 18-13-1 through 18-13-11, to define the terms "Casino," "Casino Complex," "Company," "Contractor," "Detroit-Based Business," "Detroit Resident Business," "Designated Developer," "Development Agreement," "Equal Opportunity Employment Plan," "Minority," "Person," "Preference," "Proposal," "Prospective Developer," "Request for Proposal," "Should," "Small Business Concern," "Subcontract," and "Subcontractor," to outline the administration of the casino development competitive selection process; and to establish criteria for approval of casino development agreements with designated developers.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT THAT:

Section 1. Chapter 18 of the 1984 Detroit City Code be amended by adding Article XIII, entitled "Casino

Development Competitive Selection Process" which shall consist of Sections 18-13-1 through 18-13-11, to read as follows:

Sec. 18-13-1. Statement of Intent.

The City, through its Council, finds that: (a) The process of selecting developers of Casinos must conform to all applicable laws and procedures and must be independent, impartial and responsible to the people;

(b) It is committed to providing a fair, objective and comprehensive process to select the designated developers who will be chosen to develop casinos in the City;

(c) Any proposed casino should contribute to the enhancement, expansion and stabilization of employment within the City of Detroit, including adherence to an equal opportunity employment plan as defined herein, and should contribute to the enhancement, expansion and stabilization of the local economy;

(d) It is in the best interest of the City to obtain the highest quality proposals for the development of casinos within the City;

(e) It is in the best interest of the City that any proposals to develop casinos should provide new employment opportunities for Detroit residents and serve as a catalyst for economic development in the City;

(f) It is in the best interest of the City that any proposals to develop casinos should provide for the payment of necessary infrastructure improvements to facilitate the successful operation of casinos and to minimize any negative impact of the development of casinos upon City residents;

(g) It is in the best interest of the City that any proposals to develop casinos should endeavor to showcase,

stimulate and improve the use of existing and future tourism facilities in the City and improve upon and increase the benefits of tourism;

(h) It is in the best interest of the City that any proposals to develop casinos should provide for the development of a timely, orderly and efficient arrangement of transportation and public facilities and services for Detroit residents and visitors to the City;

(i) In selecting developers of casinos, it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City (City Ordinances 15-94 and 16-94), and who actively promoted and significantly supported the State initiative authorizing gaming; and

(j) It is in the best interest of the City that any development agreements between the City and the designated developers address, among other things, the goals that are identified in the foregoing paragraphs.

Sec. 18-13-2. Definitions.

Unless otherwise defined herein, words and phrases used in this Chapter shall have the meaning ascribed to them in the Michigan Gaming Control and Revenue Act.

Casino means any premises wherein gaming is conducted and includes all buildings, improvements, equipment and facilities used or maintained in connection with such gaming.

Casino complex means the casino and all buildings, restaurants, hotel structures, recreational or entertainment facilities, restaurants or other dining facilities, bars and

lounges, retail stores and other amenities that are connected with, or operated in such an integral manner as to form a part of the same operation whether on the same tract of land or otherwise.

Company means a sole proprietorship, corporation, partnership, limited partnership, limited liability company, trust, association, joint stock company, joint venture, tribal corporation or other form of business organization.

Contractor means a person who provides goods, services, materials, equipment or supplies under a contract with a developer, except that such term does not include the City.

Detroit-based business means that term as defined in Section 18-5-1 of this Chapter, as amended.

Detroit resident business means any business which employs at least fifty-one percent Detroit residents. An individual employee will be considered a Detroit resident once the business has presented proof of such individual's payment of the City of Detroit Income Tax in the previous taxable year, or proof that the individual is now subject to payment of Detroit Income Tax due to his/her residence in the City of Detroit. Additionally, to qualify as a Detroit resident business, the firm or company must have at least four employees.

Designated developer means a prospective developer that has been selected by the Mayor to enter into a development agreement with the City to develop and operate a casino or casino complex.

Development agreement means a written agreement between the City and a designated developer that defines the contractual obligations of the parties regarding the development and operation of a casino or casino complex and other matters properly relating thereto.

Equal opportunity employment plan means a voluntary plan for the employment of women and minorities in a casino and in the construction of a casino complex.

Minority means that term as defined in Section 18-5-31 of this Chapter, as amended.

Person means any company or a natural person.

Preference means a more favorable position given to one prospective developer over another in the process established to select a designated developer.

Proposal means the response to a request for proposal and all supplements and amendments thereto.

Prospective developer means a person that has submitted a proposal to develop a casino or casino complex and enter into a development agreement with the City.

Request for proposal means those related documents as identified by the Mayor or his designee and which are furnished to prospective developers for the purpose of determining qualifications and soliciting a proposal to develop a casino or casino complex and enter into a development agreement.

Should means a strong recommendation but does not mandate the action described.

Small business concern means that term as defined in Section 18-5-1 of this Chapter, as amended.

Subcontract means an agreement between a subcontractor and a contractor under which the subcontractor will provide goods, services, materials, equipment, or supplies to a contractor.

Subcontractor means the person that has entered into a subcontract with a contractor.

Sec. 18-13-3. Request for proposals to enter into development agreements.

(a) The Mayor shall select the designated developers for the casinos or casino complexes by means of a competitive request for proposals process, which process shall prescribe the content of the request for proposals and the conduct of the process for evaluation and selection of prospective developers for negotiation of development agreements. The process should avoid restrictive specifications that might either unduly limit the number of prospective developers or exclude those prospective developers entitled to a preference pursuant to Section 18-13-6 of this Chapter from consideration.

(b) The Mayor may seek review and comment from the City Council regarding the request for proposals and any amendments to that request for proposals prior to their issuance.

(c) Without limiting the discretion of the Mayor, the following broad criteria should be considered by the Mayor in reviewing proposals:

(1) *Background and experience*, which should include the organization, expertise and experience of the prospective developer as well as the success of the prospective developer's other casinos or casino complexes.

(2) *Financial,* which should include financing arrangements for the proposed casino or casino complex, the financial strength of the prospective developer and the financial projections for the proposed casino or casino complex.

(3) *Concept,* which should include innovative and creative design and compatibility with the City's culture, features and other attractions.

(4) *Economic development,* which should include

direct and indirect benefits to employment, tourism and redevelopment in the City.

(5) Infrastructure improvements, which should include the prospective developer's plans for addressing and improving the City's infrastructure related to the proposed casino or casino complex.

(6) Social, which should include the prospective developer's plan for addressing social issues associated with gaming, including compulsive gaming.

(7) Preference qualification, which shall apply to those prospective developers that are entitled to a preference pursuant to Section 18-13-6 of this Chapter.

(d) The Mayor shall advertise the availability of the request for proposals by publishing a notice one or more times in the newspaper designated to print official business of the City and may also advertise in other newspapers, gaming trade journals or other publications of general circulation, and may send notice to persons likely to be interested therein.

(e) The Mayor or his designee may request additional information from the prospective developers and invite all prospective developers to attend informal conferences concerning the request for proposal process.

(f) The Mayor or his designee shall require that prospective developers pay specified fees in order to compensate the City for its costs of evaluating proposals, investigating prospective developers and negotiating development agreements, which fees shall be deposited into a designated City account. The Mayor or his designee may disqualify a prospective developer from further evaluation of its proposal or the negotiation of a development agreement if it does not pay the specified fees.

(g) After the closing date for submission of proposals, revisions or additional data may be solicited, if the Mayor or

his designee deems it necessary, only from those prospective developers that submitted responses during the original proposal stage. Such prospective developers will then have the opportunity to modify or supplement their proposals on such items as the Mayor or his designee may specify.

(h) All costs and expenses incurred by prospective developers relating to their proposals must be borne by the prospective developers. The City is not liable to pay such costs and expenses or to reimburse or to compensate prospective developers under any circumstances, including the rejection of any or all proposals or the cancellation of a development agreement.

(i) The Mayor or his designee may conduct the proposal process in one or more phases.

Sec. 18-13-4. Eligibility of prospective developers.

(a) The Mayor or his designee may require information and assurances from a prospective developer to demonstrate to the Mayor's satisfaction that the prospective developer is eligible to enter into a development agreement with the City.

(b) Without limiting the foregoing, a prospective developer is not eligible to enter into a development agreement with the City if:

(1) It does not demonstrate to the satisfaction of the Mayor or his designee that it has the character, reputation, experience and financial capability to operate a casino or casino complex in the public interest;

(2) It does not submit to the City a consent in the form required by the Mayor or his designee, for itself and each of its officers, directors and owners, to allow the City to evaluate the personal and professional integrity and the

professional capabilities of each individual or any other matters deemed relevant by the Mayor or his designee. Further, it shall submit to the City a release in the form required by the Mayor or his designee which shall absolve the City, its agents, or employees from liability for seeking information about the prospective developer from third parties. Such release shall also absolve the third parties from liability for providing such information; and,

(3) It or any of its employees, agents, contractors or representatives attempts, directly or indirectly, to contact with respect to a proposal or approval of a development agreement, the Mayor, any Mayoral appointee, any member of the City Council, or any City employee or City Council staff who has the ability to influence decisions relating to the proposal or development agreement. Exceptions to this prohibition must be identified in writing from the Mayor or his designee to all prospective developers. Nothing herein shall prohibit the Mayor or his designee from contacting a prospective developer to seek clarification of a proposal, preclude the prospective developer from responding to such contact or preclude direct negotiations of development agreements between the designated developer and its representatives and the Mayor and his designee and their representatives.

(c) A determination by the Mayor that a prospective developer is eligible to enter into a development agreement does not constitute a finding that the prospective developer has been or will be selected to enter into a development agreement or that the prospective developer will be issued any necessary gaming licenses.

Sec. 18-13-5. Use of a competitive selection process.

The City shall use a competitive selection process to enter into up to three development agreements with designated developers whose proposals are determined in accordance with this Chapter to be in the best interest of the City. The development agreement negotiated by the Mayor with designated developers shall be submitted to the City Council for approval.

Sec. 18-13-6. Preference for proponents of gaming proposals.

(a) In considering proposals and in selecting a prospective developer with whom the Mayor or his designee will negotiate a development agreement, a prospective developer is entitled to a preference if:

(1) its proposal meets the criteria established by this Chapter and by the request for proposals;

(2) it was the initiator of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and

(3) it made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming.

(b) Notwithstanding any other provision of this Chapter, no more than one preference shall be awarded to prospective developers who proposed city Ordinance No. 15-94, even if more than one prospective developer claims entitlement to such preference.

(c) Notwithstanding any other provision of this Chapter, no more than one preference shall be awarded to

prospective developers who proposed city Ordinance No. 16-94, even if more than one prospective developer claims entitlement to such preference.

Sec. 18-13-7. Negotiations to enter into development agreements.

(a) After applying any preference to those prospective developers entitled to a preference pursuant to Section 18-13-6 of this Chapter, the Mayor shall exercise his discretion in selecting and entering into negotiations with the three prospective developers whose proposals are deemed by the Mayor to be in the best interest of the City. To assist the City Council in its review and approval of development agreements pursuant to Section 18-13-8 of this Chapter, if the Mayor does not enter into a development agreement with a prospective developer entitled to a preference pursuant to Section 18-13-6 of this Chapter, the Mayor must state in writing and with particularity the basis upon which he determined that such proposal was not in the best interest of the City.

(b) The Mayor or his designee may enter into negotiations with other eligible prospective developers or may develop new requests for proposals in accordance with this Chapter if:

(1) The Mayor is not able to enter into development agreements with the designated developers for any reason;

(2) The City Council does not approve one or more of the development agreements pursuant to Section 18-13-8 of this Chapter;

(3) The designated developer does not receive any necessary gaming license; or,

(4) The development agreement is terminated for any reason.

Sec. 18-13-8. Approval of development agreements.

(a) The City Council shall conduct a public hearing on any proposed development agreement and determine whether it is in the best interest of the City to enter into the agreement. In determining whether the proposed development agreement is in the best interest of the City, the City Council must be satisfied:

(1) That the Mayor or his designee considered the criteria of Section 18-13-3(c) and applied the preference to those developers entitled to such preference pursuant to Section 18-13-6.

(2) That the factors identified in Section 18-13-8(a)(3) of this Chapter have been adequately identified and considered by the designated developer in its proposal.

(3) That the development agreement adequately addresses at least the following:

(a) The organizational structure of the designated developer and its affiliates including the names and backgrounds of all officers, directors and owners of the designated developer and any person that controls the designated developer, except that if the designated developer or an affiliate is publicly traded, only the names and backgrounds of owners beneficially owning greater than five percent (5%) of the shares of the publicly traded corporation need be identified, including:

(i) Whether and to what extent the officers, directors or shareholders are a minority, a Detroit resident, a Detroit-based business, a Detroit resident business or a small business concern.

(ii) Whether the designated developer or an affiliate holds a gaming license and in which jurisdiction the license is held, and whether the designated developer or an affiliate has

ever been denied a gaming license or withdrawn an application for a gaming license.

(b) The designated developer's capabilities, experience and key personnel who will be assigned to the casino or casino complex development,

(c) Projected cost budgets for the financing, design, construction, furnishing and equipping of the casino or casino complex, including costs of projected infrastructure improvements and all material assumptions upon which they are based.

(d) Projected balance sheets, income statements and cashflow statements of the casino or casino complex for the first five years of operations, using generally accepted accounting principles, and all material assumptions upon which they are based.

(e) Existing and anticipated sources of financing for the casino or casino complex, including pertinent details such as terms, rates, and security covenants, whether the designated developer has or will acquire all or some of its financing from a Detroit-based business, a Detroit resident business or a small business concern; and the developer's plan, if any, for utilization of Detroit-based minority-owned financial institutions in servicing the developer's financial needs.

(f) Current detailed financial statements for each gaming operation currently owned or operated by the designated developer.

(g) The designated developer's concept for the proposed casino or casino complex, including:

(i) The proposed development site or location for the casino or casino complex, a legal description of the property boundaries, dimensions and total acreage for the casino or casino complex, as well as any ancillary facilities proposed.

(ii) The size of the casino or casino complex; the number and types of gaming facilities; the number and types of restaurants; a description of any hotel, including the number of rooms and whether such hotel will be available for use by non-casi-no patrons; the number and types of lounges or bars; the number and types of retail shops; the number and types of ancillary entertainment or recreational facilities planned; a description of any convention facilities; and a description of any other facilities proposed.

(iii) Architectural matters, including drawings, the name(s) of the architect(s); the floor plans (discussing space allocations and major functions such as gaming floor, back-of-house, circulation, accessibility and exiting); building elevations (showing heights, relative scale and compatibility with adjacent components); landscaping; and design theme.

(iv) Proposed plans for employee, patron and bus parking; tour bus and valet drop-off facilities; service vehicle parking; satellite parking facilities; and other infrastructure related to the casino or casino complex.

(v) The proposed phasing plan, the proposed sequence of the phases and the approximate dates of beginning and completion of development of the entire project.

(vi) The designated developer's commitment to adhere to applicable zoning requirements adopted by the City.

(h) The amount and manner of investment or other contributions the designated developer will make to promote economic growth and revitalize the district in which the casino or casino complex will be located; to create new jobs and contribute to the support of existing employment opportunities; to attract new businesses, tourists and visitors to the City or to the district in which the casino or the casino complex will be located.

(i) The designated developer's plans for assisting

current businesses that may experience employee shortages due to their employees accepting employment with the casino.

(j) The manner in which the casino or casino complex will enhance the City as a desirable location for tourists, conventions, families and urban life and the manner in which the casino or casino complex will encourage pedestrian linkages with other business, economic and entertainment activities in the area in which the casino or casino complex is to be located.

(k) The amount of investment or other contributions the designated developer will make to promote economic growth and contribute to the revitalization of economically depressed areas of the City, other than the area in which the casino or casino complex is to be located; to create new jobs and contribute to the support of existing employment opportunities; and to attract new businesses, tourists and visitors to those other areas.

(l) The designated developer's plan to market the casino or casino complex and the developer's intent to cooperate and consult with the City, the Metropolitan Detroit Convention and Visitor's Bureau or other regional tourism and marketing organizations to implement a comprehensive and uniform system of marketing the City as an entertainment destination.

(m) The Key management and other staff for each functional area of operation broken down by the number of full-time and part-time positions, and for each job classification, its respective total estimated salaries and benefits.

(n) The designated developer's proposed program for staff training and development and staff relations.

(o) The designated developer's proposed equal opportunity employment plan to recruit, train and upgrade

Detroit residents, minorities and women for all employment classifications, the equal opportunity employment plan should include:

(i) How the designated developer will establish contacts in the City to foster an interest in casino careers among Detroit residents, minorities and women, and publicize and market the casino complex employment opportunities.

(ii) Any proposed systematic training program to prepare Detroit residents, minorities and women with the life skills and the employment skills necessary for responsible jobs within the casino or casino complex.

(p) The designated developer's commitment to hire construction contractors who agree to include in their construction contracts an express term that the rates, wages and fringe benefits to be paid to each class of construction mechanics and each of their subcontractors shall be not less than the rates, wages and fringe benefits prevailing in the City as established by the most recent survey of the Michigan Department of Labor for prevailing wage determination under Act 166, P.A. 1965 (Act 166, P.A. 1965), MCLA 408.551 *et. seq.*, MSA 17.256(A), *et. seq.*

(q) The designated developer's commitment to hire contractors who will commit to the goal of maximizing to the greatest extent possible the number of Detroit resident apprentices who advance to journeymen status by agreeing themselves, and requiring their contractors to agree to, and to the greatest extent possible utilizing unions that do or will, operate apprentice programs on the casino or casino complex construction sites that are open to all residents of the City.

(r) The designated developer's commitment to hire contractors who agree to implement an equal opportunity employment plan conforming to all applicable laws and consistent with the City's Executive Order 22.

(s) The designated developer's commitment to purchase goods and services from Detroit-based businesses, Detroit resident businesses or small business concerns, which to the greatest extent possible should be not less than fifty one percent of the total dollar value of all purchases of goods and services.

(t) The proposed major transportation and circulation routes, including:

(i) A plan for the proposed use of regional airports, and specifically the Detroit City Airport;

(ii) A plan for the proposed modifications and improvements to the existing roads necessary to accommodate the anticipated number of trips to and from the casino or casino complex each day by employees, visitors and buses, including the size of regional transportation facilities to be constructed or implemented, the estimated period of construction, the approximate cost and the proposed funding source.

(iii) The designated developer's proposed plan for traffic control measures, such as pedestrian-grade street crossing systems, traffic control devices, bus and other large vehicle turnout facilities, drainage mitigation and street lighting systems, the estimated period of construction, approximate cost and the proposed funding source.

(u) The designated developer's proposed measures for transportation demand management and transportation supply management, including ride-sharing, mass transit and other transportation conservation measures, which should be based on the City's requirements and the City's traffic analysis studies conducted in conjunction with casino development within the City.

(v) The designated developer's plan for any anticipated improvements to the existing regional water facilities

necessary to serve the casino or casino complex, the estimated period of construction, approximate cost and the proposed funding source.

(w) The designated developer's plan for any anticipated improvements to the existing regional sewer facilities necessary to serve the casino or the casino complex, the estimated period of construction, the approximate cost and the proposed funding source.

(x) Whether, and to what extent, the designated developer is willing to consider contracting for power service with the City of Detroit Public Lighting Department ("PLD"), provided that PLD furnishes such service at rates and quality comparable to those otherwise charged by competing electric utilities.

(y) The designated developer's plan for proposed improvements to the City's existing fire protection services that would serve the casino or casino complex, including the number of fire stations to be constructed or modified and their location, the estimated period of construction, the approximate cost and the proposed funding source.

(z) The designated developer's plan for proposed improvements to the City's existing police protection services that would serve the casino or casino complex, including the number of police precincts to be constructed or modified and their location, the estimated period of construction, the approximate cost and the proposed funding source.

(aa) The designated developer's plan for providing for or enhancing existing child care services to ensure that such services are reasonably affordable and appropriate for its prospective employees, including any estimated period of construction of such facilities, and the approximate cost of such construction.

(bb) The designated developer's plan for enhancing

existing services for treatment of compulsive behavior disorders to ensure that they are reasonably affordable and appropriate for its prospective employees and their affected families and for patrons with compulsive gaming behaviors and their affected families. The plan should include the types of public education and problem gambling prevention strategies and prevention and education strategies for employees that would be implemented as part of the operation of the casino or casino complex, the estimated period of implementation of the plan and the approximate cost of the plan.

(cc) The designated developer's plan to ensure that people under the age of 21 years will be identified and prohibited from gambling or loitering in the casino.

(dd) Any plans the designated developer has for opening a temporary casino, including the developer's plans as they pertain to the temporary casino with respect to all the subject areas prescribed at subparts (a)-(cc) of this Section, and a warranty that any proposed temporary casino will not adversely impact the viability of the planned permanent casino or casino complex.

(b) The City Council will not approve any proposed development agreement unless:

(1) It has been entered into pursuant to the provisions of this Chapter and the City Council has determined that the proposed development agreement is in the best interest of the City;

(2) All proposals were made available for review and inspection by the City Council;

(3) The designated developer has filed with the City Clerk its unconditional acceptance of all the terms of the development agreement;

(4) The City has made a preliminary determination

that the designated developer has satisfied its burden of establishing to the City's satisfaction that:

(a) It is of good character, honesty and integrity;

(b) It is a person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this State, the City, or the effective regulation and control of gaming, nor does it create the dangers of unsuitable, unfair or illegal practices in the conduct of gaming;

(c) It has adequate business probity, competence and experience, in gaming and generally; and,

(d) That the proposed financing of the entire operation is adequate for the nature of the proposed operation and from a suitable source.

(5) The development agreement requires the designated developer to reimburse the City for all expenses incurred for consultants and outside attorneys in conjunction with the casino development competitive selection process and in conjunction with the establishment of a casino regulatory scheme;

(6) The designated developer has submitted satisfactory bond or other security acceptable to the City to ensure the payment and performance in full of all obligations accepted by the designated developer in the development agreement or imposed by City Code with respect to the permanent casino or casino complex and any temporary casino; and,

(7) The development agreement requires the designated developer to comply with all statutes, ordinances and regulations governing casino gaming and requires the designated developer to receive all necessary zoning approvals for the casino or casino complex;

Sec. 18-13-9. Limited effect of development agreement.

The approval of a development agreement does not create a right or entitlement in the designated developer to any required gaming licenses or to permits or approvals otherwise required to construct and operate the casino or casino complex.

Sec. 18-13-10. Prohibitions upon assignment of development agreement.

A development agreement may not be sold or transferred in any manner, nor may any party other than the designated developer operate a casino or casino complex pursuant to the development agreement, unless the Mayor and City Council give their consent to the sale or transfer.

Sec. 18-13-11. No effect on other laws.

Irrespective of the terms of any development agreement entered into by the City, the design, development, construction, financing and operation of the casino must be in compliance with all applicable statutes, regulations, and codes of all levels of government, including any required by the State or City.

Section 2. All ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed.

Section 3. This ordinance is declared necessary for the preservation of the public peace, health, safety and welfare of the people of the City of Detroit and is hereby given immediate effect.

(J.C.C.p.) June 18, 1997
Passed: June 18, 1997
Published: July 3, 1997
Effective: July 3, 1997

JACKIE L. CURRIE
City Clerk

Detroit City Ordinance 46-98

ORDINANCE NO. 46-98
CHAPTER 18

TO AMEND ARTICLE XIII TITLED 'CASINO DEVELOPMENT COMPETITIVE SELECTION PROCESS'

AN ORDINANCE to amend the following sections of Ordinance 17-97, as amended: Section 18-13-1, to provide that the City should enter into three development agreements with the designated developers most qualified and able to maximize the long-term job opportunities, economic growth and development potential for the City of Detroit; Section 18-132, to define certain terms as used herein; Section 18-13-3, to require a proposed developer to demonstrate its experience and ability to operate a major land-based casino; Section 18-13-4, to prohibit improper contacts between prospective developers and the City in the developer selection and development agreement approval process; Section 18-13-6, to reaffirm the City's commitment to the designated developers it has selected who are entitled to a preference in the developer selection and development agreement approval process; Section 18-13-7, to ratify and support the Mayor's determination in the selection of three designated developers; and Section 18-13-8, to provide for the prompt approval by the City Council of three development agreements.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT THAT:

Section 1. Chapter 18 of the 1984 Detroit City Code be amended by amending Sections 18-13-1, 18-13-2, 18-13-3,

18-13-4, 18-13-6, 18-13-7, and 18-13-8, and Section 2 to read in their entirety as follows:

ARTICLE XIII. CASINO DEVELOPMENT COMPETITIVE SELECTION PROCESS

Sec. 18-13-1. Statement of Intent.

The City, through its Council, finds that: (1) The process of selecting developers of casinos must conform to all applicable laws and procedures and must be independent, impartial and responsible to the People;

(2) It is committed to providing a fair, objective, timely, and comprehensive process to select and approve the designated developers who will be chosen to develop casinos in the City;

(3) Any proposed casino should contribute to the enhancement, expansion and stabilization of employment within the City of Detroit, including adherence to an equal opportunity employment plan as defined herein, and should contribute to the enhancement, expansion and stabilization of the local economy;

(4) It is in the best interest of the City to obtain the highest quality proposals for the development of casinos within the City;

(5) It is in the best interest of the City that any proposals to develop casinos should provide new employment opportunities for Detroit residents and serve as a catalyst for economic development in the City;

(6) It is in the best interest of the City that any proposals to develop casinos should provide for the payment of necessary infrastructure improvements to facilitate the successful operation of casinos and to minimize any negative impact of the development of casinos upon City residents;

(7) It is in the best interest of the City that any proposals to develop casinos should endeavor to showcase, stimulate and improve the use of existing and future tourism facilities in the City and improve upon and increase the benefits of tourism;

(8) It is in the best interest of the City that any proposals to develop casinos should provide for the development of a timely, orderly and efficient arrangement of transportation and public facilities and services for Detroit residents and visitors to the City;

(9) In selecting developers of casinos, it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City (City Ordinances 15-94 and 16-94), and who actively promoted and significantly supported the State initiative authorizing gaming; and

(10) In the selection of designated developers of casinos, it is in the best interest of the City to select three designated developers who have local participation in their ownership and governance and have the demonstrated economic capability and experience with constructing and operating major land-based casinos necessary to best sustain indefinitely viable and successful casinos and casino complexes, so as to ensure long-term jobs and employment opportunities for the City, increase the opportunities for Detroit businesses, increase the taxes paid to the City, and otherwise maximize the economic growth and development potential for the City; and

(11) It is in the best interest of the City that any development agreements between the City and the designated developers address, among other things, the goals that are

identified in the foregoing paragraphs.

Sec. 18-13-2. Definitions.

Unless otherwise defined herein, words and phrases used in this Chapter shall have the meaning ascribed to them in the Michigan Gaming Control and Revenue Act.

Casino means any premises wherein gaming is conducted and includes all buildings, improvements, equipment and facilities used or maintained in connection with such gaming.

Casino complex means the casino and all buildings, restaurants, hotel structures, recreational or entertainment facilities, restaurants or other dining facilities, bars and lounges, retail stores and other amenities that are connected with, or operated in such an integral manner as to form a part of the same operation whether on the same tract of land or otherwise.

Company means a sole proprietorship, corporation, partnership, limited partnership, limited liability company, trust, association, joint stock company, joint venture, tribal corporation or other form of business organization.

Contractor means a person who provides goods, services, materials, equipment or supplies under a contract with a developer, except that such term does not include the City.

Designated developer means a prospective developer that has been selected by the Mayor to enter into a development agreement with the City to develop and operate a casino or casino complex.

Detroit-based business means a business with a physical and economic relationship to the City determined by the payment of City income taxes on the developer's net

profits, City excise taxes, and City property taxes on a plant or office and equipment such as is ordinarily required for performance or on other real or personal property in the City equivalent in value to such plant or office and equipment, for not less than the two (2) successive taxable years immediately prior to the date of determination.

Detroit resident business means any business which employs at least fifty-one (51%) percent Detroit residents. An individual employee will be considered a Detroit resident once the business has presented proof of such individual's payment of the City of Detroit Income Tax in the previous taxable year, or proof that the individual is now subject to payment of Detroit Income Tax due to his/her residence in the City of Detroit. Additionally, to qualify as a Detroit resident business, the firm or company must have a least four (4) employees.

Development agreement means a written agreement between the City and a designated developer that defines the contractual obligations of the parties regarding the development and operation of a casino or casino complex and other matters properly relating thereto.

Equal opportunity employment plan means a voluntary plan for the employment of women and minorities in a casino and in the construction of a casino complex.

Improper contact means a written or oral communication relating to the merits or outcome of a decision relating to a proposal or development agreement that is directed to the Mayor, any Mayoral appointee, any member of the City Council, or any City employee or City Council appointee or staff who has the ability to influence decisions relating to the proposal or development agreement. The term does not include a communication that is:

(1) An inquiry or request for information relating

solely to the status of a decision on proposals or the status of a development agreement so long as the inquiry or request for information is directed to an individual authorized by either the Mayor or the City Council to respond to such inquiry or request and so long as the inquiry does not address the merits or outcome of a decision;

(2) Testimony or statements by a designated developer at a public hearing;

(3) Made through the public media, such as statements in news interviews and paid advertisements; or

(4) Otherwise permitted by Section 18-13-4 herein.

Local means having residency, business interests, or other significant community connections in or with Detroit or the surrounding metropolitan area.

Minority means that term as defined in Section 18-5-31 of this Chapter, as amended.

Person means any company or a natural person.

Preference means a more favorable position given to one prospective developer over another in the process established to select a designated developer.

Proposal means the response to a request for proposal and all supplements and amendments thereto.

Prospective developer means a person, including its owners, members, partners or participants, that has submitted a proposal to develop a casino or casino complex and enter into a development agreement with the City.

Request for proposal means those related documents as identified by the Mayor or his designee that are furnished to prospective developers for the purpose of determining qualifications and soliciting a proposal to develop a casino or casino complex and enter into a development agreement.

Should means a strong recommendation but does not mandate the action described.

Small business concern means that term as defined in Section 18-5-1 of this Chapter, as amended.

Subcontract means an agreement between a subcontractor and a contractor under which the subcontractor will provide goods, services, materials, equipment, or supplies to a contractor.

Subcontractor means the person that has entered into a subcontract with a contractor.

Sec. 18-13-3. Request for proposals to enter into development agreements.

(a) The Mayor shall select the designated developers for the casinos or casino complexes by means of a competitive request for proposals process, which process shall prescribe the content of the request for proposals and the conduct of the process for evaluation and selection of prospective developers for negotiation of development agreements. The process should avoid restrictive specifications that might either unduly limit the number of prospective developers or exclude those prospective developers entitled to a preference pursuant to Section 18-13-6 of this Chapter from consideration.

(b) The Mayor may seek review and comment from the City Council regarding the request for proposals and any amendments to that request for proposals prior to their issuance.

(c) Without limiting the discretion of the Mayor, the following broad criteria should be considered by the Mayor in reviewing proposals:

(1) *Background and experience,* which should include the organization, expertise and experience of the prospective developer in constructing and operating major land-based casinos as well as the success of the prospective developer's

other land-based casinos or casino complexes.

(2) *Financial,* which should include financing arrangements for the proposed casino or casino complex, the financial strength of the prospective developer and the financial projections for the proposed casino or casino complexes.

(3) *Concept,* which should include innovative and creative design and compatibility with the City's culture, features and other attractions.

(4) *Economic development,* which should include direct and indirect benefits to employment, tourism and redevelopment in the City.

(5) *Infrastructure improvements,* which should include the prospective developer's plans for addressing and improving the City's infrastructure related to the proposed casino or casino complex.

(6) *Social,* which should include the prospective developer's plan for addressing social issues associated with gaming, including compulsive gaming.

(7) *Preference qualification,* which shall apply to those prospective developers that are entitled to a preference pursuant to Section 18-13-6 of this Chapter.

(d) The Mayor shall advertise the availability of the request for proposals by publishing a notice one (1) or more times in the newspaper designated to print official business of the City and may also advertise in other newspapers, gaming trade journals or other publications of general circulation, and may send notice to persons likely to be interested therein.

(e) The Mayor or his designee may request additional information from the prospective developers and invite all prospective developers to attend informal conferences concerning the request for proposal process.

(f) The Mayor or his designee shall require that

prospective developers pay specified fees in order to compensate the City for its costs of evaluating proposals, investigating prospective developers and negotiating development agreements, which fees shall be deposited into a designated City account. The Mayor or his designee may disqualify a prospective developer from further evaluation of its proposal or the negotiation of a development agreement if it does not pay the specified fees.

(g) After the closing date for submission of proposals, revisions or additional data may be solicited, if the Mayor or his designee deems it necessary, only from those prospective developers that submitted responses during the original proposal stage. Such prospective developers will then have the opportunity to modify or supplement their proposals on such items as the Mayor or his designee may specify.

(h) All costs and expenses incurred by prospective developers, relating to their proposals must be borne by the prospective developers. The City is not liable to pay such costs and expenses or to reimburse or to compensate prospective developers under any circumstances, including the rejection of any or all proposals or the cancellation of a development agreement.

(i)The Mayor or his designee may conduct the proposal process in one or more phases.

(j) If the Mayor has already selected a designated developer without considering a term or criterion that was not included in this Ordinance at the time the selection was made, he will not be required to consider that term or criterion as to any designated developer already selected.

Sec. 18-13-4. Eligibility of prospective developers.

(a) The Mayor or his designee may require

information and assurances from a prospective developer to demonstrate to the Mayor's satisfaction that the prospective developer, is eligible to enter into a development, agreement with the City.

(b) Without limiting the foregoing, a prospective or a designated developer is not eligible to enter into a development agreement with the City if:

(1) It does not demonstrate to the satisfaction of the Mayor or his designee that it has the character, reputation, experience and financial capability to operate a casino or casino complex in the public interest;

(2) It does not submit to the City a consent in the form required by the Mayor or his designee, for itself and each of its officers, directors and owners, to allow the City to evaluate the personal and professional integrity and the professional capabilities of each individual or any other matters deemed relevant by the Mayor or his designee. Further, it shall submit to the City a release in the form required by the Mayor or his designee which shall absolve the City, its agents, or employees from liability for seeking information about the prospective developer from third parties. Such release shall also absolve the third parties from liability for providing such information; and,

(3) It or any of its employees, agents, contractors or representatives, directly or indirectly, knowingly makes an improper contact. For purposes of this subsection, there shall be a presumption that any such contact was made with the knowledge of, its content, and purpose; this presumption may be rebutted by the prospective or designated developer.

a. Nothing in this Section shall prohibit the Mayor or his designee from contacting a prospective developer to seek clarification of a proposal, preclude the prospective developer from responding to such contact, preclude direct negotiations

of development agreements between the designated developer and its representatives and the Mayor and his designee and their representatives, preclude the City Council or its representatives from contacting a designated developer to seek clarification of a proposed development agreement, or preclude the designated developer from responding such contact. However, the City Council shall not negotiate any provision of any development agreement with any designated developer. With the exception of those persons designated by the Mayor or the City Council to make inquiries or to respond to inquiries from prospective or designated developers, all such contacts must be either in writing or recorded within forty-eight (48) hours of the contact.

b. The Mayor and the City Council may designate one (1) or more persons to respond to inquiries from prospective or designated developers or to make inquiries on behalf of the Mayor or City Council. Any person so designated shall be named on a list made available to each prospective or designated developer and to the Public. Each such person may, as they deem appropriate, keep a written record of any contact and shall make such record available to the Mayor and to the City Council upon request.

c. A determination by the Mayor that a prospective developer is eligible to enter into a development agreement does not constitute a finding that the prospective developer has been or will be selected to enter into a development agreement, that the City Council will approve a proposed development agreement, or that the prospective developer will be issued any necessary gaming licenses.

Sec. 18-13-6. Preference for proponents of gaming proposals.

(a) In considering proposals and in selecting a prospective developer with whom the Mayor or his designee will negotiate a development agreement, a prospective developer is entitled to a preference if:

(1) Its proposal meets the criteria established by this Chapter and by the request for proposals;

(2) It was the initiator of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and

(3) It made, significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming.

(b) Notwithstanding any other provision of this Chapter, no more than one (1) preference shall be awarded to prospective developers who proposed City Ordinance No. 15-94, even if more than one (1) prospective developer claims entitlement to such preference.

(c) Notwithstanding any other provision of this Chapter, no more than one (1) preference shall be awarded to prospective developers who proposed City Ordinance No. 16-94, even if more than one (1) prospective developer claims entitlement to such preference.

(d) No preferences other than those authorized in Section 18-13-6(a)(1)(2) and (3) herein may be awarded to any other prospective developers in either the developer selection process or the development agreement approval process, and the City Council is not authorized to in any manner revoke or nullify a prospective developer's preference or eligibility for a preference under this Section.

Sec. 18-13-7. Negotiations to enter into development agreements.

(a) After applying any preference to those prospective developers entitled to a preference pursuant to Section 18-13-6 of this Chapter, the Mayor shall exercise his discretion in selecting and, entering into negotiations with the three (3) prospective developers whose proposals are deemed by the Mayor to be in the best interest of the City. To assist the City Council in its review and approval of development agreements pursuant to Section 18-13-8 of-this Chapter, if the Mayor does not enter into a development agreement with a prospective developer entitled to a preference pursuant to Section 18-13-6 of this Chapter, the Mayor must state in writing and with particularity the basis upon which he determined that such proposal was not in the best interest of the City.

(b) The Mayor or his designee may enter into negotiations with other eligible prospective developers or may develop new requests for proposals in accordance with this Chapter if:

(1) The Mayor is not able to enter into development agreements with the designated developers for any reason:

(2) The City Council does not approve one (1) or more of the development agreements pursuant to Section 18-13-8 of this Chapter;

(3) The designated developer does not receive any necessary gaming license; or,

(4) The development agreement is terminated for any reason.

(c) The City Council has no authority to negotiate any development agreements, but it may approve development agreements executed with a designated developer selected by the Mayor. It is in the City's best interest that the City

Council's approval process proceed both throughly and expeditiously.

Sec. 18-13-8. Approval of development agreements.

(a) The City Council shall promptly conduct a public hearing on any proposed development agreement and determine whether it is in the best interest of the City to enter into the agreement. In determining whether the proposed development agreement is in the best interest of the City, the City Council must be satisfied:

(1) That the Mayor or his designee considered the criteria of Section 18-13-3(c) and applied a preference to those developers entitled to such preference pursuant to Section 18-13-6.

(2) That the factors identified in Section 18-13-8(a)(3) of this Chapter have been adequately considered, by the designated developer in its proposal.

(3) That the development agreement adequately addresses at least the following:

a. The organizational structure of the designated developer and its affiliates, including the names and backgrounds of all officers, directors and owners of the designated developer and any person that controls the designated developer, except that if the designated developer or an affiliate is publicly traded, only the names and backgrounds of owners beneficially owning greater than five percent (5%) of the shares of the publicly traded corporation need be identified, including:

(i) Whether and to what extent the officers, directors or shareholders are a minority, a Detroit resident, a Detroit-based business, a Detroit resident business or a small business concern.

(ii) Whether the designated developer or an affiliate holds a gaming license for a land-based casino and in which jurisdiction the license is held, and whether the designated developer or an affiliate has ever been denied a gaming license or withdrawn an application for a gaming license.

b. The designated developer's capabilities, experience and key personnel who will be assigned to the casino or casino complex development.

c. Projected cost budgets for the financing, design, construction, furnishing and equipping of the casino or casino complex, including costs of projected infrastructure improvements and all material assumptions upon which they are based.

d. Projected balance sheets, income statements and cash flow statements of the casino or casino complex for the first five (5) years of operations, using generally accepted accounting principles, and all material assumptions upon which they are based.

e. Existing and anticipated sources of financing for the casino or casino complex, including pertinent details such as terms, rates, and security covenants, whether the designated developer has or will acquire all or some of its financing from a Detroit-based business, a Detroit resident business or a small business concern; and the developer's plan, if any, for utilization of Detroit-based minority-owned financial institutions in servicing the developer's financial needs.

f. Current detailed financial statements for each gaming operation currently owned or operated by the designated developer.

g. The designated developer's concept for the proposed casino or casino complex, including:

(i) The proposed development site or location for the casino or casino complex, a legal description of the property

boundaries, dimensions and total acreage for the casino or casino complex, as well as any ancillary facilities proposed.

(ii) The size of the casino or casino complex; the number and types of gaming facilities; the number and types of restaurants; a description of any hotel, including the number of rooms and whether such hotel will be available for use by non-casino patrons; the number and types of lounges or bars; the number and types of retail shops; the number and types of ancillary entertainment or recreational facilities planned; a description of any convention facilities; and a description of any other facilities proposed.

(iii) Architectural matters, including drawings, the name(s) of the architect(s); the floor plans (discussing space allocations and major functions such as gaming floor, back-of-house, circulation, accessibility and exiting); building elevations (showing heights, relative scale and compatibility with adjacent components); landscaping; and design theme.

(iv) Proposed plans for employee, patron and bus parking; tour bus and valet drop-off facilities; service vehicle parking; satellite parking facilities; and other infrastructure related to the casino or casino complex:

(v) The proposed phasing plan, the proposed sequence of the phases and the approximate dates of beginning and completion of development of the entire project.

(vi) The designated developer's commitment to adhere to applicable zoning requirements adopted by the City.

h. The amount and manner of investment or other contributions the designated developer will make to promote economic growth and revitalize the district in which the casino or casino complex will be located; to create new jobs and contribute to the support of existing employment opportunities; to attract new businesses, tourists and visitors to the City or to the district in which the casino or the casino

complex will be located.

i. The designated developer's plans for assisting current businesses that may experience employee shortages due to their employees accepting employment with the casino.

j. The manner in which the casino or casino complex will enhance the City as a desirable location for tourists, conventions, families and urban life and the manner in which the casino or casino complex will encourage pedestrian linkages with other business, economic and entertainment activities in the area in which the casino or casino complex is to be located.

k. The amount of investment or other contributions the designated developer will make to promote economic growth and contribute to the revitalization of economically depressed areas of the City, other than the area in which the casino or casino complex is to be located; to create new jobs and contribute to the support of existing employment opportunities; and to attract new businesses, tourists and visitors to those other areas.

l. The designated developer's plan to market the casino or casino complex and the developer's intent to cooperate and consult with the City, the Metropolitan Detroit Convention and Visitor's Bureau or other regional tourism and marketing organizations to implement a comprehensive and uniform system of marketing the City as an entertainment destination.

m. The key management and other staff for each functional area of operation broken down by the number of full-time and part-time positions, and for each job classification, its respective total estimated salaries and benefits.

n. The designated developer's proposed, program for staff training and development and staff relations.

o. The designated developer's proposed equal opportunity employment plan to recruit, train and upgrade Detroit residents, minorities, and women for all employment classifications. The equal employment, plan should include:

(i) How the designated developer will establish contacts in the City to foster an interest in casino careers among Detroit residents, minorities and women, and publicize and market the casino complex employment opportunities.

(ii) Any proposed systematic training program to prepare Detroit residents, minorities and women with the life skills and the employment skills necessary for responsible jobs within the casino or casino complex.

p. The designated developer's commitment to hire construction contractors who agree to include in their construction contracts an express term that the rates, wages, and fringe benefits to be paid to each class of construction mechanics and each of their subcontractors shall be not less than the rates, wages and fringe benefits prevailing in the City as established by the most recent survey of the Michigan Department of Labor for prevailing wage determination under Act 166, P.A. 1965 (Act 166, P.A. 1965), MCLA 408.551 *et seq.*, MSA 17.256(A), *et seq.*

q. The designated developer's commitment to hire contractors who will commit to the goal of maximizing to the greatest extent possible the number of Detroit resident apprentices who advance to journeymen status by agreeing themselves, and requiring their contractors to agree to, and to the greatest extent possible utilizing unions that do or will, operate apprentice programs on the casino or casino complex construction sites that are open to all residents of the City.

r. The designated developer's commitment to hire contractors who agree to implement an equal opportunity employment plan conforming to all applicable laws and

consistent with the City's Executive Order 22.

s. The designated developer's commitment to purchase goods and services from Detroit-based businesses, Detroit resident businesses or small business concerns, which to the greatest extent possible should be not less than fifty one percent (51%) of the total dollar value of all purchases of goods and services.

t. The proposed major transportation and circulation routes, including:

(i) A plan for the proposed use of regional airports, and specifically the Detroit City Airport;

(ii) A plan for the proposed modifications and improvements to the existing roads necessary to accommodate the anticipated number of trips to and from the casino or casino complex each day by employees, visitors and buses, including the size of regional transportation facilities to be constructed, or implemented, the estimated period of construction, the approximate cost and the proposed funding source.

(iii) The designated developer's proposed plan for traffic control measures, such as pedestrian-grade street crossing systems, traffic control devices, bus and other large vehicle turnout facilities, drainage mitigation and street lighting systems, the estimated period of construction, approximate cost and the proposed funding source.

u. The designated developer's proposed measures for transportation demand management and transportation supply management, including ride-sharing, mass transit and other transportation conservation measures, which should be based on the City's requirements and the City's traffic analysis studies conducted in conjunction with casino development within the City.

v. The designated developer's plan for any anticipated

improvements to the existing regional water facilities necessary to serve the casino or casino complex, the estimated period of construction, approximate cost and the proposed funding source.

w. The designated developer's plan for any anticipated improvements to the existing regional sewer facilities necessary to serve the casino or the casino complex, the estimated period of construction, the approximate cost and the proposed funding source.

x. Whether, and to what extent, the designated developer is willing to consider contracting for power service with the City of Detroit Public Lighting Department ("PLD"), provided that PLD fumishes such service at rates and quality comparable to those otherwise charged by competing electric utilities.

y. The designated developer's plan for proposed improvements to the City's existing fire protection services that would serve the casino or casino complex, including the number of fire stations to be constructed or modified and their location, the estimated period of construction, the approximate cost and the proposed funding source.

z. The designated developer's plan for proposed improvements to the City's existing police protection services that would serve the casino or casino complex, including the number of police precincts to be constructed or modified and their location, the estimated period of construction, the approximate cost and the proposed funding source.

aa. The designated developer's plan for providing for or enhancing existing child care services to ensure that such services are reasonably affordable and appropriate for its prospective employees, including any estimated period of construction of such facilities, and the approximate cost of such construction.

bb. The designated developer's plan for enhancing existing services for treatment of compulsive behavior disorders to ensure that they are reasonably affordable and appropriate for its prospective employees and their affected families and for patrons with compulsive gaming behaviors and their affected families. The plan should include the types of public education and problem gambling prevention strategies and prevention and education strategies for employees that would be implemented as part of the operation of the casino or casino complex, the estimated period of implementation of the plan and the approximate cost of the plan.

cc. The designated developer's plan to ensure that people under the age of twenty-one (21) years will be identified and prohibited from gambling or loitering in the casino.

dd. Any plans the designated developer has for opening a temporary casino, including the developer's plans as they pertain to the temporary casino with respect to all the subject areas prescribed at subparts (a)-(cc) of this Section, and a warranty that any proposed temporary casino will not adversely impact the viability of the planned permanent casino or casino complex.

(b) The City Council will not approve any proposed development agreement unless:

(1) It has been entered into pursuant to the provisions of this Chapter and the City Council has determined that the proposed development agreement is in the best interest of the City;

(2) All proposals were made available for review and inspection by the City Council;

(3) The designated developer has filed with the City Clerk its unconditional acceptance of all the terms of the

development agreement;

(4) The City has made a preliminary determination that the designated developer has satisfied its burden establishing to the City's satisfaction that:

a. It is of good character, honesty and integrity;

b. It is a person whose poor activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of the State, the City, or the effective regulation and control of gaming, nor does it create the dangers of unsuitable, unfair or illegal practices in the conduct of gaming;

c. It has adequate business probity, competence and experience, in gaming and generally; and,

d. That the proposed financing of the entire operation is adequate for the nature of the proposed operation and from a suitable source.

(5) The development agreement requires the designated developer to reimburse the City for all expenses incurred for consultants and outside attorneys in conjunction with the casino development competitive selection process and in conjunction with the establishment of a casino regulatory scheme;

(6) The designated developer has submitted satisfactory bond or other security acceptable to the city to ensure the payment and performance in full of all obligations accepted by the designated developer in the development agreement or imposed by City Code with respect to the permanent casino or casino complex and any temporary casino; and,

(7) The development agreement requires the designated developer to comply with all statutes, ordinances and regulations governing casino gaming and requires the designated developer to receive all necessary zoning

approvals for the casino or casino complex.

(c) The City Council should promptly address these considerations in order to facilitate the casino licensing process and create jobs and economic opportunity for the City as quickly as is prudently possible.

(d) The City Council should approve three (3) development agreements. The City Council may not reject, revoke, or otherwise rescind or terminate a development agreement, nor deny or withhold approval of a development agreement, on grounds other than the criteria delineated in Section 18-13-8(a) and (b) at the time the designated developer was selected by the Mayor.

Section 2. All ordinances, or parts of ordinances, in conflict herewith be and the same are hereby repealed.

Section 3. If any word, clause, sentence, paragraph, provision, or section of this ordinance is invalidated by any court of competent jurisdiction, the remaining words, clauses, provisions, paragraphs, and sections shall not be affected and shall continue in full force and effect.

Section 4. This Ordinance is declared necessary for the preservation of public peace, health, safety and welfare of the People of the City of Detroit, and shall be given immediate effect in accordance with the 1997 Detroit City Charter.

Approved by the Voters: August 4, 1998
Certified by the Board of
City Canvassers: August 18, 1998
Effective: September 17, 1998
Published: April 20, 1999

JACKIE L. CURRIE
City Clerk

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

NO. 2:97CV67

[Filed February 26, 1997]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, THOMAS DENOMME, MICHAEL STACEY, PAULA BLANCHARD, RICHIE DAVIS, and KAREN BATCHELOR FARMER; and THE CITY OF DETROIT, MICHIGAN, DENNIS W. ARCHER, MARY ANN MAHAFFEY, GIL HILL, CLYDE CLEVELAND, SHEILA COCKREL, BRENDA M. SCOTT, NICHOLAS HOOD, III, ALBERTA TINSLEY-WILLIAMS, MEL RAVITZ, and KAY EVERETT,

Defendants.

COMPLAINT

Plaintiff, Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter "LVD"), alleges:

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief brought by LVD to declare the Michigan Gaming Control and Revenue Act, M.C.L.A. Section 432.201, *et seq.* (hereinafter the "Act"), or portions thereof, in violation of the United States Constitution and the Constitution of the State of Michigan, to sever the unconstitutional portions of the Act, if possible, from the remainder of the Act, and to enjoin Defendants from taking actions which violate the United States Constitution and the Constitution of the State of Michigan under the authority and color of the Act.

JURISDICTION AND VENUE

2. This is a civil action arising under the Constitution and laws of the United States, and this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331.

3. This is a civil action to redress the deprivation under color of Michigan law, of rights, privileges and immunities of LVD and its individual members secured by the Constitution of the United States providing for equal rights of citizens or of all persons of any jurisdiction of the United States, and this Court has jurisdiction pursuant to 28 U.S.C. 1343(3).

4. This a civil action for declaratory judgment and injunctive relief pursuant to 42 U.S.C. § 1983, and this Court has jurisdiction pursuant to 28 U.S.C. § 1343(4).

5. With regard to claims in this Complaint arising under the Laws of the State of Michigan, such claims are so related to LVD's claims arising under the Constitution and Laws of the United States that such claims form part of the same case or controversy under Article III of the United States Constitution. Accordingly, this Court has supplemental jurisdiction over those claims in this Complaint arising under the laws of the State of Michigan pursuant to 28 U.S.C. §1367(a).

6. A substantial part of the events giving rise to the claims stated herein occurred in this district, and venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

7. This Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

PARTIES

8. Plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians is a federally recognized Indian Tribe with three hundred forty two (342) enrolled members, and is organized pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 476), as amended. LVD's Tribal Reservation is located in Gogebic County, Michigan.

9. The Michigan Gaming Control Board is a type 1 agency within the Department of Treasury of the State of

Michigan, established and organized pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* The Michigan Gaming Control Board has the authority and duty to enforce and supervise the Michigan Gaming Control and Revenue Act.

10. Thomas Denomme is a resident of West Bloomfield, Michigan, and is Chairman of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Mr. Denomme is sued in his official and in his individual capacities.

11. Michael Stacey is a resident of West Bloomfield, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Mr. Stacey is sued in his official, and in his individual capacities.

12. Paula Blanchard is a resident of West Bloomfield, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Ms. Blanchard is sued in her official and in her individual capacities.

13. Richie Davis is a resident of West Bloomfield, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of

Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Mr. Davis is sued in his official and in his individual capacities.

14. Karen Batchelor Farmer is a resident of Wayne County, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Ms. Batchelor Farmer is sued in her official and in her individual capacities.

15. The City of Detroit is a municipality organized and existing in Wayne County, Michigan, under and pursuant to the laws of the State of Michigan.

16. Dennis W. Archer is a resident of Wayne County, Michigan, and is the duly elected Mayor of the City of Detroit. Archer is sued in his individual and official capacities.

17. Defendants, Mary Ann Mahaffey, Gil Hill, Clyde Cleveland, Sheila M. Cockrel, Brenda M. Scott, Nicholas Hood III, Alberta Tinsley-Williams, Mel Ravitz, and Kay Everett, all residents of Wayne County, Michigan, and are elected members to the City Council of the City of Detroit, Michigan, the governing body of the City of Detroit, Michigan. Defendants, Mahaffey, Hill, Cleveland, Cockrel, Scott, Hood, Tinsley-Williams, Ravitz, and Everett, are sued in their individual and official capacities.

GENERAL ALLEGATIONS

18. In July, 1990, LVD and several other Michigan Indian Tribes filed an action against the State of Michigan and Governor John M. Engler in the U.S. District Court for the Western District of Michigan, Sault Ste. Marie Tribe of Chippewa Indians, Et al. v. Governor John M. Engler, Case No. 1:90 CV 611, alleging failure to negotiate in good faith for a Class III gaming compact pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"). The State of Michigan was subsequently dismissed from the action. On August 20, 1993, the District Court entered a Consent Judgment which incorporated a stipulated agreement (hereinafter the "Stipulation") between the Tribes and the Governor which provided, *inter alia,* that the Tribes and the Governor would execute Class III gaming compacts which permitted the Tribes to operate, among other things, Class III electronic games of chance on Indian lands. The Stipulation provided that it would obligate and bind the parties thereto upon execution of Class III gaming compacts between the Governor and each Tribe, and upon concurrence by resolution of the Michigan Legislature.

19. The Stipulation further provided that the Tribes would make semi-annual payments to the Michigan Strategic Fund in an amount equal to eight percent (8%) of the Net Win at each casino derived from all Class III electronic games of chance so long as there was a binding Class III compact in effect between each Tribe and the State of Michigan which provided for the play of electronic games of chance, and only so long as the Tribes collectively enjoyed the exclusive right to operate electronic games of chance in the State of Michigan.

20. On August 20, 1993, Michigan Governor, John M. Engler, entered into compacts with the Tribes as provided in the Stipulation and Consent Judgment. In September, 1993, the legislature concurred in and approved the compacts and Stipulation by House Concurrent Resolution No. 439. The compacts were subsequently approved by the Secretary of the Interior, in accordance with IGRA.

21. Since 1993, LVD has continually been engaged in the business of casino gaming in Michigan, including the operation of Class III electronic games of chance and other Las Vegas type casino gaming.

22. The revenues that LVD has derived from its Tribal government gaming operation have been used to combat conditions of extreme poverty that have existed on the Tribe's Reservation for decades. Prior to the advent of gaming, the unemployment rate on LVD's Reservation was eighty five percent (85%). LVD's gaming facility has been largely responsible for lowering the Reservation unemployment rate to fifteen percent (15%). Furthermore, the revenues that LVD has derived from its gaming operation have enabled LVD to provide essential government services to its members, including health care, education, housing, !aw enforcement and infrastructure development. Gaming revenues have enabled LVD to achieve greater Tribal self-sufficiency, and have reduced LVD's reliance on state and federal government assistance.

23. On November 5, 1996, the electorate of the State of Michigan approved a ballot initiative known as "Proposal E", which provides, *inter alia,* for the authorization, licensing and control of casino gaming

operations within the City of Detroit, and the regulation of casino gaming by the Michigan Gaming Control Board. 1996 MI Legis. Proposal E (West 1996). The adopted legislative initiative (Proposal E) is known as the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* (hereinafter the "Act").

24. Although the Act was the result of an initiative, under Michigan law, "the power of initiative extends only to laws which the legislature may enact under [the Michigan] Constitution." Mich. Const. Art. 2 § 9.

25. The Act establishes the Michigan Gaming Control Board (hereinafter the "Board"), consisting of five (5) members appointed by the Governor with the advice and consent of the Senate. The Board has the authority and duty to enforce and supervise the administration of the Act, including the authority and duty to issue, suspend and revoke licenses to operate casinos. M.C.L.A. §§ 432.205, 432.206.

26. The Act limits the location of casino gaming operations to cities which meet the following criteria:

a. The City has a population of at least eight hundred thousand (800,000) at the time the license is issued;

b. The City is located within one hundred (100) miles of any other state or country in which gaming is permitted; and

c. The majority of the voters of the local unit of government have expressed approval of casino gaming in the City.

See M.C.L.A. §432.202(f).

27. The City of Detroit is the only city in the State of Michigan that meets the criteria set forth in M.C.L.A. §432.202(f).

28. Section 6 of the Act sets forth criteria which applicants must meet prior to becoming eligible for a casino license. Section 6(a)(1) provides that the Board shall issue a casino license upon a determination that the applicant is eligible, and that the Board shall find the applicant eligible for a casino license where:

> Prior to the date of application:
>
> (i) the applicants or its affiliates or affiliated companies was the initiator of any casino gaming proposal submitted for voter approval in the city in which the casino will be located and the voters approved the proposal; or
>
> (ii) the applicant was selected by the city pursuant to a competitive bidding process.

M.C.L.A. §432.206(a)(i).

Section 6(a)(ii) of the Act fails to provide standards or criteria which potential applicants must meet in order to be

selected by the City of Detroit, and thus become eligible to apply for a casino license.

29. Section 6(b) of the Act provides:

> No more than three (3) licenses shall be issued by the Board in any city. In the event that more than three (3) applicants meet the criteria provided for in Section 6(a) of this Act, licenses shall first be issued to applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

M.C.L.A. §432.206(b).

At the time the Act was voted on and adopted, there were two, at a minimum, known identifiable entities whom met the criteria set forth in § 432.206(a)(1)(i) and (b): Atwater Entertainment, Inc. (hereinafter "Atwater") and Greektown Casino, L.L.C. (hereinafter "Greektown") and their affiliates.

30. Atwater and Greektown are entities which, like LVD, are engaged in the business of casino gaming, including electronic games of chance, in the State of Michigan, or intend to engage in casino gaming, including electronic games of chance, as licensees pursuant to the Act.

31. With regard to all claims for relief, LVD has no adequate remedies under the laws of the State of Michigan.

FIRST CLAIM FOR RELIEF

32. LVD realleges and reincorporates paragraphs 1 through 31 herein by this reference.

33. The Stipulation, incorporated into the Consent Judgment, constitutes a contract under the laws of the State of Michigan.

34. In the Stipulation, LVD and the Governor agreed that LVD, along with six (6) other Michigan Tribes, would collectively enjoy the exclusive right to operate Class III electronic games of chance in the State of Michigan, and, in return for said exclusive right, the Tribes would pay to the Michigan Strategic Fund eight percent (8%) of the Tribes' net revenues derived from Class III electronic games of chance. LVD has fully performed its obligations in accordance with the Stipulation.

35. Upon enactment, the Act impaired, and continues to impair, the Tribes' collective and exclusive contractual right to operate Class III electronic games of chance in the State of Michigan. As such, the Act violates Article I, Section 10 of the United States Constitution, and Article I, Section 10 of the Michigan Constitution.

36. As a direct and proximate result of the impairment of the Tribes' collective exclusive contractual right to operate Class III electronic games of chance in the State of Michigan, LVD has sustained and will continue to sustain damage in the form of increased operational costs, loss of employees, loss of customers and/or patrons, loss of good will, and loss of revenue derived from its gaming operation.

37. Unless enjoined, Defendants, Michigan Gaming Control Board, Denomme, Stacey, Blanchard, Davis, and Farmer, are compelled by the Act to issue licenses for the operation of electronic games ofchance to persons other than the Tribes, in violation of LVD's right of against impairment of obligation of contract, and in violation of 42 U.S.C. §1983.

38. Unless enjoined, the Defendants, City of Detroit, Archer, Mahaffey, Hill, Cleveland, Cockrel, Scott, Hood, Tinsley-Williams, Ravitz, and Everett, are compelled by the Act to select persons or entities other than the Tribes as eligible applicants for licenses to operate casinos and electronic- games of chance. Such actions violate LVD's fight against the impairment of obligation of contract secured by Article I, Section 10 of the United States Constitution, and Article I, Section 10 of the Michigan Constitution, and violates 42 U.S.C. §1983.

SECOND CLAIM FOR RELIEF

39. LVD reaileges and reincorporates paragraphs I through 38 herein by this reference.

40. The Stipulation incorporated into the Consent Judgment constitutes a contract under the law of the State of Michigan.

41. In the Stipulation LVD and the Governor agreed that LVD, along with six (6) other Michigan Tribes, agreed that the Tribes would collectively enjoy the exclusive right to operate Class III electronic games of chance in the State of Michigan, and in return for said exclusive right, the

Tribes would pay the Michigan Strategic Fund eight percent (8%) of the Tribes' net revenues derived from Class III electronic games of chance. The State of Michigan ratified and concurred in the Stipulation in a House Concurrent Resolution No. 439 (Sept. 1993)

42. The exclusive right bargained for and secured by LVD in the Stipulation and Consent Judgment constitutes a property right owned by LVD.

43. Upon enactment, the Act destroyed and/or substantially impaired the Tribes' collective exclusive right to operate Class III electronic games of chance in the State of Michigan. As such, the Act operated as a taking of the Tribes' collective exclusive right to operate Class III electronic games of chance in the State of Michigan.

44. The State of Michigan has not compensated LVD or any other Michigan Tribe for the taking of their collective exclusive property right to operate Class III electronic games of chance in the State of Michigan in violation of the Fourteenth Amendment to the United States Constitution and Article X, Section 2 of the Constitution of the State of Michigan.

THIRD CLAIM FOR RELIEF

45. LVD realleges and reincorporates paragraphs 1 through 44 herein by this reference.

46. The Act gives preferential treatment to a narrow group of persons or entities by (1) exempting Atwater, Greektown and their affiliates from the competitive bidding

process with regard to selection of applicants, and (2) mandating that licenses for the operation of casino gaming in the City of Detroit, Michigan, be issued by the Board to Atwater, Greektown and their affiliates. There is no legitimate or rational basis for mandating such preferential treatment.

47. The Act is unconstitutional because it purports to grant special privileges and/or immunities to known identifiable persons who are in the same class as, and/or are similarly situated to, LVD, and, as such, the Act violates the Fourteenth Amendment of the United States Constitution, and Article I, Section 2 of the Constitution of the State of Michigan.

48. As a direct and proximate result of the special privileges that the Act grants to persons or entities in the same class and/or similarly situated to LVD, LVD stands to sustain imminent irreparable harm and damage by being denied the equal protection of the laws of the State of Michigan, and by being denied the ability to compete for a casino license in the City of Detroit on an equal basis with those persons or entities which are granted such special privileges under the Act.

49. Because the Act mandates that Defendants grant special privileges to persons or entities in the same class and/or similarly situated to LVD, LVD has sustained and will continue to sustain harm in the form of increased operational costs, loss of employees, loss of customers/patrons of its casino, loss of good will, and loss of revenue derived from its casino business.

50. Unless enjoined by an order of this Court, Defendants are compelled by the Act to accord special privileges and preferential treatment to persons in the same class as, or similarly situated to LVD, and to deny LVD the equal protection of the laws of the State of Michigan, in violation of Fourteenth Amendment to the United States Constitution, 42 U.S.C. §1983, and Article I, Section 2 of the Constitution of the State of Michigan.

FOURTH CLAIM FOR RELIEF

51. LVD realleges and reincorporates paragraphs 1 through 50 herein by this reference. The Act grants special privileges to Atwater, Greektown and their affiliates by

a. exempting Atwater, Greektown and their affiliates from the competitive bidding process with regard to the selection of casino licensees by the City of Detroit pursuant to M.C.L.A. § 432.206(a)(1) and (3); and

b. requiring the Board to issue casino licenses to Atwater, Greektown and their affiliates for the operation of casino gaming in the City of Detroit, pursuant to M.C.L.A. § 432.206(b).

53. The Act violates the prohibition against special legislation contained in Michigan Constitution Article IV, Section 29, by creating an arbitrary, unreasonable and capricious classification of persons or entities whom are to be granted special privileges not granted to other persons or

entities whom, like LVD, are in the same class as Atwater, Greektown and their affiliates, and are in the same or similar circumstances to Atwater, Greektown and their affiliates.

FIFTH CLAIM FOR RELIEF

54. LVD realleges and reincorporates paragraphs 1 through 53 herein by this reference.

55. The Act deprives LVD of property without due process of law, in violation of LVD's due process rights under the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Constitution of the State of Michigan by:

a. Mandating that applicants be selected by the City of Detroit as a prerequisite to becoming an eligible applicant for a casino license;

b Failing to set forth standards to be followed by the City of Detroit in selecting eligible applicants for casino licenses;

c. Failing to give applicants adequate notice of the standards such applicants must satisfy in order to become an eligible applicant for a casino license.

SIXTH CLAIM FOR RELIEF

56. LVD realleges and reincorporates paragraphs 1 through 55 herein by this reference.

57. The Act delegates legislative authority to the City of Detroit by granting to the City of Detroit the absolute authority to determine which persons or entities are eligible to apply for casino licenses. M.C.L.A. § 432.206(a)(ii).

58. The delegation of legislative authority to the City of Detroit in §432.206(a)(ii) constitutes an unlawful delegation of legislative authority in violation of Article I, Section 4 of the Michigan Constitution, because such delegation is arbitrary and excessively broad, as the Act does not set forth standards or criteria for the City of Detroit to follow in selecting eligible applicants, nor does the Act require the City of Detroit to promulgate any standards or criteria for selecting eligible applicants.

PRAYER FOR RELIEF

WHEREFORE, LVD respectfully requests that this Court:

1. With regard to LVD's first claim for relief, an order:

   a. declaring the Act illegal and unconstitutional under Article I, Section 10 of the United States Constitution and Article I, Section 10 of the Michigan Constitution; or

   b. in the alternative to (a), an order declaring those portions of the Act which purport to

pemdt casino licenses to be granted to persons other than the Michigan Tribes who were parties to the Stipulation unconstitutional under Article I, Section 10 of the United States Constitution and Article I, Section 10 of the Michigan Constitution; to sever such unconstitutional portions from the remainder of the Act; and

c. with regard to casino gaming authorized under the Act, permanently enjoining Defendants from issuing any casino or other licenses under the Act to persons or entities other than the Tribes whom were parties to the Consent Judgment and Stipulation.

2. With regard to LVD's second claim for relief, an order:

a. declaring the Act illegal and unconstitutional under the Fourteenth Amendment to the United States Constitution and Article X, Section 2 of the Michigan Constitution; or

b. in the alternative to (a), an order declaring those portions of the Act which purport to permit casino licenses to be granted to persons other than the Michigan Tribes who were parties to the Stipulation unconstitutional under the Fourteenth Amendment to the United States Constitution and Article X, Section 2 of the Michigan Constitution; to sever such

unconstitutional portions from the remainder of the Act; and with regard to casino gaming authorized under the Act, to permanently enjoin Defendants from issuing any casino or other licenses to, or entering into any agreements with, under the Act to persons or entities other than the Tribes whom were parties to the Consent Judgment and Stipulation.

3. With regard to LVD's third claim for relief, an order:

a. declaring those portions of the Act which grant special privileges and immunities and deny LVD equal protection of all laws unconstitutional under the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Michigan Constitution;

b. severing those portions of the Act which grant special privileges and immunities and deny LVD equal protection of all laws from the remaining portions of the Act which do not violate the United States or Michigan Constitutions;

c. permanently enjoining Defendants from denying LVD equal protection of the laws, or granting special privileges and/or immunities to Atwater and/or Greektown and their affiliates, or any other person or entity which submitted any gaming proposal for voter

approval prior to January 1, 1995, in the City of Detroit, or any other applicant who initiated or shall initiate any casino gaming proposal submitted for voter approval in the city in which the casino will be located.

d. in the alternative to (a) and (b) an order declaring the entire Act unconstitutional under Article I, Section 2 of the Michigan Constitution and the Fourteenth Amendment of the United States Constitution;

4. With regard to LVD's fourth claim for relief, an order:

a. declaring those portions of the Act which grant special privileges and immunities or deny LVD equal protection of the laws unconstitutional under Article IV, Section 29 of the Michigan Constitution;

b. severing those portions of the Act which grant special privileges and immunities or deny LVD equal protection of the laws from the remaining portions of the Act which do not violate the Michigan Constitution;

c. permanently enjoining Defendants from denying LVD equal protection of the laws or from granting special privileges and/or immunities to Atwater and/or Greektown and their affiliates, or any other person or entity which submitted any gaming proposal for

voter approval prior to January 1, 1995, in the City of Detroit, or any other applicant who initiated or shall initiate any casino gaming proposal submitted for voter approval in the city in which the casino will be located.

d. in the alternative to (a) and (b), to declare the entire Act unconstitutional under Article IV, Section 29 of the Michigan Constitution;

5. With regard to LVD's fifth claim for relief, an order:

a. declaring the Act unconstitutional under the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Michigan Constitution; and

b. severing those portions of the Act which violate the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Michigan Constitution from the remaining portions of the Act;

c. enjoining Defendants from selecting eligible applicants or granting casino gaming licenses pursuant to the Act;

d. in the alternative to subparagraph a and b, an order declaring the entire Act unconstitutional under the Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Michigan Constitution.

6. With regard to LVD's sixth claim for relief, an order:

a. declaring those portions of the Act which delegate legislative authority to the City of Detroit unconstitutional under Article I, Section 4 of the Michigan Constitution;

b. severing those portions of the Act which unlawfully delegate authority to the City of Detroit from the remaining portions of the Act;

c. permanently enjoining Defendants, City of Detroit, Archer, Mahaffey, Hill, Cleveland, Cockrel, Scott, Hood, Tinsley-Williams, Ravitz, and Everett, from selecting eligible applicants for casino licenses pursuant to the Act or entering into agreements with potential applicants pursuant to the Act;

d. in the alternative to subparagraph a and b, an order declaring the entire Act unconstitutional under the Article I, Section 4 of the Michigan Constitution.

DATED this 25 day of February, 1997.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,
Plaintiff,
By /s/_____
John M. Peebles #15735
Conly J. Schulte #20158

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APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

CASE NO. 2:97-CV-067
JUDGE ROBERT HOLMES BELL

[Dated August 18, 1997]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, THOMAS DENOMME, MICHAEL STACEY, PAULA BLANCHARD, RICHIE DAVIS, and KAREN BATCHELOR FARMER; and THE CITY OF DETROIT, MICHIGAN, DENNIS W. ARCHER, MARY ANN MAHAFFEY, GIL HILL, CLYDE CLEVELAND, SHEILA COCKREL, BRENDA M. SCOTT, NICHOLAS HOOD, III, ALBERTA TINSLEY-WILLIAMS, MEL RAVITZ, and KAY EVERETT,

Defendants.

ATWATER ENTERTAINMENT, L.L.C.;)
GREEKTOWN CASINO, L.L.C.; and)
FRANK J. KELLEY,)
ATTORNEY GENERAL, ex *rel*)
THE PEOPLE OF THE STATE OF MICHIGAN,)
)
Intervenor/Defendants.)
)

FIRST AMENDED COMPLAINT

Plaintiff, Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter "LVD"), alleges:

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief brought by LVD to declare the Michigan Gaming Control and Revenue Act, as amended, M.C.L.A. Section 432.201, *et seq.* (hereinafter the "Amended Act"), and Sections 18-13-11 of the Detroit City Code (hereinafter the "Development Ordinance") or portions thereof, in violation of the United States Constitution and the Constitution of the State of Michigan, to sever the unconstitutional portions of the Amended Act and Development Ordinance, if possible, from the remainder of the Amended Act and Development Ordinance, and to enjoin Defendants from taking actions which violate the United States Constitution and the Constitution of the State of Michigan under the authority and color of the Amended Act and Development Ordinance.

JURISDICTION AND VENUE

2. This is a civil action arising under the Constitution and laws of the United States, and this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331.

3. This is a civil action to redress the deprivation under color of Michigan law, of rights, privileges and immunities of LVD and its individual members secured by the Constitution of the United States providing for equal rights of citizens or of all persons of any jurisdiction of the United States, and this Court has jurisdiction pursuant to 28 U.S.C. 1343(3).

4. This a civil action for declaratory judgment and injunctive relief pursuant to 42 U.S.C. § 1983, and this Court has jurisdiction pursuant to 28 U.S.C. § 1343(4).

5. With regard to claims in this Complaint arising under the Laws of the State of Michigan, such claims are so related to LVD's claims arising under the Constitution and Laws of the United States that such claims form part of the same case or controversy under Article III of the United States Constitution. Accordingly, this Court has supplemental jurisdiction over those claims in this Complaint arising under the laws of the State of Michigan pursuant to 28 U.S.C. §1367(a).

6. A substantial part of the events giving rise to the claims stated herein occurred in this district, and venue is proper in this district pursuant to 28 U.S.C. 8 1391(b).

7. This Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 22O2.

PARTIES

8. Plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians is a federally recognized Indian Tribe with three hundred forty two (342) enrolled members, and is organized pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 476), as amended. LVD's Tribal Reservation is located in Gogebic County, Michigan.

9. The Michigan Gaming Control Board is a type 1 agency within the Department of Treasury of the State of Michigan, established and organized pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* The Michigan Gaming Control Board has the authority and duty to enforce and supervise the Michigan Gaming Control and Revenue Act.

10. Thomas Denomme is a resident of West Bloomfield, Michigan, and is Chairman of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Mr. Denomme is sued in his official and in his individual capacities.

11. Michael Stacey is a resident of West Bloomfield, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan

Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Mr. Stacey is sued in his official and in his individual capacities.

12. Paula Blanchard is a resident of West Bloomfield, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Ms. Blanchard is sued in her official and in her individual capacities.

13. Richie Davis is a resident of West Bloomfield, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Mr. Davis is sued in his official and in his individual capacities.

14. Karen Batchelor Farmer is a resident of Wayne County, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Ms. Batchelor Farmer is sued in her official and in her individual capacities.

15. The City of Detroit is a municipality organized and existing in Wayne County, Michigan, under and pursuant to the laws of the State of Michigan.

16. Dennis W. Archer is a resident of Wayne County, Michigan, and is the duly elected Mayor of the City

of Detroit. Archer is sued in his individual and official capacities.

17. Defendants, Mary Ann Mahaffey, Gil Hill, Clyde Cleveland, Sheila M. Cockrel, Brenda M. Scott, Nicholas Hood III, Alberta Tinsley-Williams, Mel Ravitz, and Kay Everett, all residents of Wayne County, Michigan, and are elected members to the City Council of the City of Detroit, Michigan, the governing body of the City of Detroit, Michigan. Defendants, Mahaffey, Hill, Cleveland, Cockrel, Scott, Hood, Tinsley-Williams, Ravitz, and Everett, are sued in their individual and official capacities.

GENERAL ALLEGATIONS

18. In July, 1990, LVD and several other Michigan Indian Tribes filed an action against the State of Michigan and Governor John M. Engler in the U.S. District Court for the Western District of Michigan, Sault Ste. Marie Tribe of Chippewa Indians, Et al. v. Governor John M. Engler, Case No. 1:90 CV 611, alleging failure to negotiate in good faith for a Class III gaming compact pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"). The State of Michigan was subsequently dismissed from the action. On August 20, 1993, the District Court entered a Consent Judgment which incorporated a stipulated agreement (hereinafter the "Stipulation") between the Tribes and the Governor which provided, *inter alia,* that the Tribes and the Governor would execute Class III gaming compacts which permitted the Tribes to operate, among other things, Class III electronic games of chance on Indian lands. The Stipulation provided that it would obligate and bind the parties thereto upon execution of Class III gaming compacts between the

Governor and each Tribe, and upon concurrence by resolution of the Michigan Legislature.

19. The Stipulation further provided that the Tribes would make semi-annual payments to the Michigan Strategic Fund in an amount equal to eight percent (8%) of the Net Win at each casino derived from all Class III electronic games of chance so long as there was a binding Class III compact in effect between each Tribe and the State of Michigan which provided for the play of electronic games of chance, and only so long as the Tribes collectively enjoyed the exclusive right to operate electronic games of chance in the State of Michigan.

20. On August 20, 1993, Michigan Governor, John M. Engler, entered into compacts with the Tribes as provided in the Stipulation and Consent Judgment. In September, 1993, the legislature concurred in and approved the compacts and Stipulation by House Concurrent Resolution No. 439. The compacts were subsequently approved by the Secretary of the Interior, in accordance with IGRA.

21. Since 1993, LVD has continually been engaged in the business of casino gaming in Michigan, including the operation of Class III electronic games of chance and other Las Vegas type casino gaming.

21(a). LVD has arranged for the development of major casino resort development projects in the State of Michigan, including a project in conjunction with Full House Resorts, Inc., and GTECH Corporation for the development of a casino resort project in downtown Detroit, Michigan, which included a development in excess of two million

(2,000,000) square feet of the former Hudson's Department Store, at a projected cost of Two Hundred Million Dollars ($200,000,000) to Three Hundred Million Dollars ($300,000,000). In addition, LVD has executed the development, finance and construction of a multi-million dollar casino, hotel, fine dining and golf resort that the Tribe currently owns and operates on its Reservation in Gogebic County, Michigan.

21(b). At all times relevant herein, LVD has been ready and has had the ability to submit the requisite information for a casino development proposal in accordance with the Request for Proposals / Qualifications issued by the City of Detroit on June 23, 1997, and Sections 18-13-1 through 18-13-11 of the Detroit City Code.

22. The revenues that LVD has derived from its Tribal government gaming operation have been used to combat conditions of extreme poverty that have existed on the Tribe's Reservation for decades. Prior to the advent of gaming, the unemployment rate on LVD's Reservation was eighty five percent (85%). LVD's gaming facility has been largely responsible for lowering the Reservation unemployment rate to fifteen percent (15%). Furthermore, the revenues that LVD has derived from its gaming operation have enabled LVD to provide essential government services to its members, including health care, education, housing, law enforcement and infrastructure development. Gaming revenues have enabled LVD to achieve greater Tribal self-sufficiency, and have reduced LVD's reliance on state and federal government assistance.

23. On November 5, 1996, the electorate of the State of Michigan approved a ballot initiative known as "Proposal E", which provided, *inter alia,* for the authorization, licensing and control of casino gaming operations within the City of Detroit, and the regulation of casino gaming by the Michigan Gaming Control Board. 1996 MI Legis. Proposal E (West 1996). The adopted legislative initiative (Proposal E) was codified at M.C.L.A. § 432.201, *et seq.*.

24. Although the Act was the result of an initiative, under Michigan law, "the power of initiative extends only to laws which the legislature may enact under [the Michigan] Constitution." Mich. Const. Art. 2 § 9.

24(a). On July 17, 1997, the Michigan Governor signed into law Senate Bill number 569, "A Bill to amend the initiated law of 1996, entitled 'Michigan Gaming Control and Revenue Act.'" (hereinafter the "Amended Act"). 1997 MI S.B. 569 (substituted version) (June 26, 1997).

25. The Amended Act establishes the Michigan Gaming Control Board (hereinafter the "Board"), consisting of five (5) members appointed by the Governor with the advice and consent of the Senate. The Board has the authority and duty to enforce and supervise the administration of the Amended Act, including the authority and duty to issue, suspend and revoke licenses to operate casinos.

25(a). The Amended Act grants the Board the general responsibility for the implementation of the Act, including deciding all casino license applications, promulgating rules necessary to implement, administer and enforce the Amended

Act, licensing and regulating persons participating in or involved with casino gaming authorized under the Act, adopting standards for the licensing of all persons under the Amended Act, revoking or suspending licenses issued under the Act, and delegating the execution of any of its powers under the Amended Act (with the exception of granting casino licenses pursuant to Section 6 of the Amended Act). 1997 MI S.B. 569 § 4(17)(A)-(D); IV(A)(1)(E), (K), (R).

26. The Amended Act limits the location of casino gaming operations to cities which meet the following criteria:

a. The City has a population of at least eight hundred thousand (800,000) at the time the license is issued;

b. The City is located within one hundred (100) miles of any other state or country in which gaming was permitted on December 5, 1996; and

c. The majority of the voters of the local unit of government have expressed approval of casino gaming in the City.

See 1997 MI S.B. 569 §2 (L).

27(a). The City of Detroit is the only city in the State of Michigan that meets the criteria set forth in the Amended Act, 1997 MI S.B. 569 § 2(L).

28(a). Section 6(1) of the Amended Act sets forth criteria which applicants must meet prior to becoming eligible for a casino license. Section 6(1) of the Amended Act

provides, in relevant part:

> The Board shall issue a casino license to a person who applies for a license, pays the non-refundable application fee required under Section 5(5) and a $25,000 license fee for the first year of operation, and who the Board determines is eligible and suitable to receive a casino license under this Act and the rules promulgated by the Board . . . A person is eligible to apply for a casino license if all of the following criteria are met:
>
> . . .
>
> (b) The applicant entered into a certified development agreement with the city where the local legislative body enacted an ordinance approving casino gaming.

Section 6(1)(B) of the Amended Act fails to provide standards or criteria which potential applicants must meet in order to be selected by the city, and thus become eligible to apply for a casino license.

29(a). Section 6(3) of the Amended Act provides:

> No more than three (3) licenses shall be issued by the Board in any city. In evaluating the eligibility and suitability of all applicants under the standards provided in this Act, the Board shall establish and apply the standards to all applicants in a consistent and uniform manner.

> In the event that more than three applicants meet the standards for eligibility and suitability provided for in subsections (4) and (5), licenses shall first be issued to those eligible and suitable applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

1997 MI S.B. 569 § 6(3).

At the time that the Amended Act was enacted, there were at a minimum two (2) known identifiable entities whom met the criteria set forth in the last sentence of § 6(3) of the Amended Act: Atwater Entertainment, Inc., and Greektown Casino, L.L.C., and their affiliates.

29(b). On June 18, 1997, the Detroit City Council unanimously approved an ordinance entitled, "An Ordinance to Amend Chapter 18 of the 1984 Detroit City Code by Adding Article XIII entitled 'Casino Development Competitive Selection Process.'" (the "Development Ordinance"). The Development Ordinance sets forth procedures and requirements that the City and potential casino license applicants must meet in obtaining a Certified Development Agreement, as described in Section 6 of the Act. Section 18-13-6(a) of the Development Ordinance provides:

> Sec. 18-13-6. Preference for Proponents of Gaming Proposals.

> (a) In considering proposals and in selecting a prospective developer with whom the Mayor or his designee will negotiate a development agreement, a prospective developer is entitled to a preference if:
>
> (1) Its proposal meets the criteria established by this chapter and by the request for proposals;
>
> (2) It was the initiator of a casino gaming proposal which was approved by the voters of this city prior to January 1, 1995;
>
> (3) It made significant contributions to the development of gaming within the city be actively promoting and significantly supporting a state initiative authorizing gaming.

29(c). Section 18-13-2 of the Development Ordinance defines "Preference" as used in § 18-13-6 as, "A more favorable position given to one prospective developer over another in the process established to select a designated developer."

29(d). The Development Ordinance was presented to the Mayor of the City of Detroit for approval on June 24, 1997, and was returned to the City Clerk neither approved nor vetoed by the mayor on June 30, 1997. Under the terms of the Charter for the City of Detroit, an ordinance returned to the City Clerk neither approved or vetoed by the Mayor shall be deemed enacted upon receipt by the City Clerk.

29(e). At the time the Development Ordinance was voted on and at the time that the Development Ordinance became effective there were, at a minimum, two (2) known identifiable entities who met the criteria set forth in § 18-13-6 of the Development Ordinance: Atwater Entertainment, Inc., and Greektown Casino, L.L.C. and their affiliates.

30. Atwater and Greektown are entities which, like LVD, are engaged in the business of casino gaming, including electronic games of chance, in the State of Michigan, or intend to engage in casino gaming, including electronic games of chance, as licensees pursuant to the Act.

31. With regard to all claims for relief, LVD has no adequate remedies under the laws of the State of Michigan.

FIRST CLAIM FOR RELIEF

32. LVD realleges and reincorporates paragraphs 1 through 31 herein by this reference.

33. The Stipulation, incorporated into the Consent Judgment, constitutes a contract under the laws of the State of Michigan.

34. In the Stipulation, LVD and the Governor agreed that LVD, along with six (6) other Michigan Tribes, would collectively enjoy the exclusive right to operate Class III electronic games of chance in the State of Michigan, and, in return for said exclusive right, the Tribes would pay to the Michigan Strategic Fund eight percent (8%) of the Tribes' net revenues derived from Class III electronic games of chance. LVD has fully performed its obligations in accordance with the Stipulation.

35(a). Upon enactment, the Amended Act impaired, and continues to impair, the Tribes' collective and exclusive contractual right to operate Class III electronic games of chance in the State of Michigan. As such, the Amended Act violates the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Michigan Constitution.

36. As a direct and proximate result of the impairment of the Tribes' collective exclusive contractual right to operate Class III electronic games of chance in the State of Michigan, LVD has sustained and will continue to sustain damage in the form of increased operational costs, loss of employees, loss of customers and/or patrons, loss of good will, and loss of revenue derived from its gaming operation.

37. Unless enjoined, Defendants, Michigan Gaming Control Board, Denomme, Stacey, Blanchard, Davis, and Farmer, are compelled by the Amended Act to issue licenses for the operation of electronic games of chance to persons other than the Tribes, in violation of LVD's right of against impairment of obligation of contract, and in violation of 42 U.S.C. § 1983.

38. Unless enjoined, the Defendants, City of Detroit, Archer, Mahaffey, Hill, Cleveland, Cockrel, Scott, Hood, Tinsley-Williams, Ravitz, and Everett, are compelled by the Amended Act to select persons or entities other than the Tribes as eligible applicants for licenses to operate casinos and electronic games of chance. Such actions violate LVD's right against the impairment of obligation of contract secured by Article I, Section 10 of the United States Constitution, and Article I, Section 10 of the Michigan Constitution, and

violates 42 U.S.C. § 1983.

SECOND CLAIM FOR RELIEF

39. LVD realleges and reincorporates paragraphs 1 through 38 herein by this reference.

40. The Stipulation incorporated into the Consent Judgment constitutes a contract under the law of the State of Michigan.

41. In the Stipulation LVD and the Governor agreed that LVD, along with six (6) other Michigan Tribes, agreed that the Tribes would collectively enjoy the exclusive right to operate Class III electronic games of chance in the State of Michigan, and in return for said exclusive right, the Tribes would pay the Michigan Strategic Fund eight percent (8%) of the Tribes' net revenues derived from Class III electronic games of chance. The State of Michigan ratified and concurred in the Stipulation in a House Concurrent Resolution No. 439 (Sept. 1993)

42. The exclusive right bargained for and secured by LVD in the Stipulation and Consent Judgment constitutes a property fight owned by LVD.

43(a). Upon enactment, the Amended Act destroyed and/or substantially impaired the Tribes' collective exclusive right to operate Class III electronic games of chance in the State of Michigan. As such, the Amended Act operated as a taking of the Tribes' collective exclusive right to operate Class III electronic games of chance in the State of Michigan.

44. The State of Michigan has not compensated LVD or any other Michigan Tribe for the taking of their collective exclusive property fight to operate Class III electronic games of chance in the State of Michigan in violation of the Fourteenth Amendment to the United States Constitution and Article X, Section 2 of the Constitution of the State of Michigan.

THIRD CLAIM FOR RELIEF

45. LVD realleges and reincorporates paragraphs 1 through 44 herein by this reference.

46(a). The Amended Act gives preferential treatment to a narrow group of persons or entities by mandating that licenses for the operation of casino gaming in the City of Detroit, Michigan, be issued first by the Board to Atwater, Greektown and their affiliates. There is no legitimate or rational basis for mandating such preferential treatment.

47(a). The Amended Act is unconstitutional because it purports to grant special privileges and/or immunities to known identifiable persons who are in the same class as, and/or are similarly situated to, the Tribe, and, as such, the Amended Act violates the Fourteenth Amendment of the United States Constitution, and Article I, Section 2 of the Constitution of the State of Michigan.

48(a). As a direct and proximate result of the special privileges that the Amended Act grants to persons or entities in the same class and/or similarly situated to the Tribe, the Tribe stands to sustain imminent irreparable harm and damage by being denied the equal protection of the laws of the State

of Michigan, and by being denied the ability to compete for a casino license in the City of Detroit on an equal basis with those persons or entities which are granted such special privileges under the Amended Act.

49(a). Because the Amended Act mandates that Defendants grant special privileges to persons or entities in the same class and/or similarly situated to the Tribe, the Tribe has sustained and will continue to sustain harm in the form of increased operational costs, loss of employees, loss of customers/patrons of its casino, loss of good will, and loss of revenue derived from its casino business.

50(a). Unless enjoined by an order of this Court, Defendants are compelled by the Amended Act to accord special privileges and preferential treatment to persons in the same class as, or similarly situated to the Tribe, and to deny the Tribe the equal protection of the laws of the State of Michigan, in violation of Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, and Article I, Section 2 of the Constitution of the State of Michigan.

FOURTH CLAIM FOR RELIEF

51. LVD realleges and reincorporates paragraphs 1 through 50 herein by this reference.

51(a). LVD realleges and reincorporates paragraphs 1 through 50(a) herein by this reference.

52(a). The Amended Act grants special privileges to Atwater, Greektown and their affiliates by requiring the Board to issue casino licenses first to Atwater, Greektown and

their affiliates for the operation of casino gaming in the City of Detroit pursuant to Section 6 of the Amended Act.

53(a). The Amended Act violates the prohibition against special legislation contained in Michigan Constitution Article IV, Section 29, by creating an arbitrary, unreasonable and capricious classification of persons or entities whom are to be granted special privileges not granted to other persons or entities whom, like LVD, are in the same class as Atwater, Greektown and their affiliates, and are in the same or similar circumstances to Atwater, Greektown and their affiliates.

FIFTH CLAIM FOR RELIEF

54(a). LVD realleges and reincorporates paragraphs 1 through 53(a) herein by this reference.

55(a). The Amended Act deprives LVD of property without due process of law, in violation of the LVD's due process rights under the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Constitution of the State of Michigan by failing to set forth standards to be followed by the City of Detroit in selecting applicants with whom the City will enter into certified development agreements and by failing to give potential applicants adequate notice of the standards that such potential applicants must satisfy in order to be selected by the City of Detroit for participation in a certified development agreement.

SIXTH CLAIM FOR RELIEF

56(a). LVD realleges and reincorporates paragraphs 1 through 55(a) herein by this reference.

57(a). The Amended Act delegates legislative authority to the City of Detroit by granting the City of Detroit the absolute authority to determine which persons or entities with whom the City will execute a certified development agreement.

58(a). The delegation of legislative authority to the City of Detroit contained in the Amended Act constitutes an unlawful delegation of legislative authority in violation of Article IV, Section I of the Michigan Constitution, because such delegation is arbitrary and excessively broad, as the Amended Act does not set forth standards or criteria for the City of Detroit to follow in selecting persons or entities for participation in a certified development agreement, nor does the Amended Act require the City of Detroit to promulgate any standards or criteria for selecting persons or entities for participation in a certified development agreement.

SEVENTH CLAIM FOR RELIEF

59. LVD realleges and reincorporates 1 through 58(a) herein by this reference.

60. The Development Ordinance gives preferential treatment to a narrow group of persons or entities by requiring that the Mayor of the City of Detroit give preferential treatment to a narrow group of persons or entities, namely Atwater, Greektown and their affiliates, in considering casino development proposals and in selecting a prospective casino developer with whom the Mayor or his designee will negotiate a Certified Development Agreement. There is no legitimate or rational basis for mandating such preferential treatment.

61. The Development Ordinance is unconstitutional because it purports to grant special privileges, immunities and preferences to known identifiable persons or entities who are in the same class as, and/or are similarly situated to, LVD and, as such, the Amended Act violates the Fourteenth Amendment of the United States Constitution, and Article I, Section 2 of the Constitution of the State of Michigan.

62. As a direct and proximate result of the special privileges, immunities and preferences that the Development Ordinance grants to Atwater, Greektown and their affiliates, LVD stands to sustain irreparable harm and damage by being denied the equal protection of the laws of the State of Michigan, and by being denied the ability to compete for a casino license in the City of Detroit on an equal basis with such persons or entities whom are granted such privileges, immunities and preferences under the Development Ordinance.

63. Unless enjoined by an order of this Court, Defendant, City of Detroit, Mayor of Detroit, and members of the Detroit City Council are compelled by the Development Ordinance to accord special privileges, immunities and preferences to persons in the same class as, or similarly situated to, LVD, and to deny LVD the equal protection of the laws of the State of Michigan, in violation of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, and Article I, Section 2 of the Constitution of the State of Michigan.

EIGHTH CLAIM FOR RELIEF

64. LVD realleges and reincorporates paragraphs

numbered 1 through 63 herein by The Development Ordinance deprives LVD of property without due process of law, in violation of LVD's due process rights under the Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Constitution of the State of Michigan, by mandating that the Mayor of the City of Detroit grant a preference to Atwater, Greektown and their affiliates in considering proposals and in selecting a prospective developer with whom the Mayor or his designee will negotiate a development agreement pursuant to the Amended Act.

NINTH CLAIM FOR RELIEF

66. LVD realleges and reincorporates paragraphs 1 through 65 herein by this reference.

67. The Development Ordinance grants special privileges to Atwater, Greektown and their affiliates by requiring the City of Detroit, the Mayor of the City of Detroit, and/or the members of the Detroit City Council to grant a preference to Atwater, Greektown and/or their affiliates in the selection of developers with whom the City of Detroit will negotiate and execute a Development Agreement.

68. The Development Ordinance violates the prohibition against special legislation contained in Michigan Constitution, Article IV, Section 29, by creating an arbitrary, unreasonable and capricious classification of persons or entities whom are to be granted special privileges not granted to other person or entities whom, like LVD, are in the same class as Atwater, Greektown and their affiliates, and whom, like LVD, are in the same or similar circumstances as

Atwater, Greektown and their affiliates.

PRAYER FOR RELIEF

WHEREFORE, LVD respectfully requests that this Court:

l(a). With regard to LVD's First Claim for Relief, an order:

a. declaring the Amended Act illegal and unconstitutional under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Michigan Constitution; or

b. in the alternative to (a), an order declaring those portions of the Amended Act which purport to permit casino licenses to be granted to persons other than the Michigan Tribes who were parties to the Stipulation unconstitutional under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Michigan Constitution; to sever such unconstitutional portions from the remainder of the Amended Act; and

c. with regard to casino gaming authorized under the Amended Act, permanently enjoining Defendants from issuing any casino or other licenses under the Amended Act to

persons or entities other than the Tribes whom were parties to the Consent Judgment and Stipulation.

2(a). With regard to LVD's Second Claim for Relief, an order:

a. declaring the Amended Act illegal and unconstitutional under the Fourteenth Amendment to the United States Constitution and Article X, Section 2 of the Michigan Constitution; or

b. in the alternative to (a), an order declaring those portions of the Amended Act which purport to permit casino licenses to be granted to persons other than the Michigan Tribes who were parties to the Stipulation unconstitutional under the Fourteenth Amendment to the United States Constitution and Article X, Section 2 of the Michigan Constitution; to sever such unconstitutional portions from the remainder of the Amended Act; and, with regard to casino gaming authorized under the Amended Act, to permanently enjoin Defendants from issuing any casino or other licenses to, or entering into any agreements with, under the Amended Act to persons or entities other than the Tribes whom were parties to the Consent Judgment

and Stipulation.

3(a). With regard to LVD's Third Claim for Relief, an order:

a. declaring those portions of the Amended Act which grant special privileges and immunities and deny LVD equal protection of the laws unconstitutional under the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Michigan Constitution;

b. severing those portions of the Amended Act which grant special privileges and immunities and deny LVD equal protection of the laws from the remaining portions of the Amended Act which do not violate the United States or Michigan Constitutions;

c. permanently enjoining Defendants from denying LVD equal protection of the laws, or granting special privileges and/or immunities to Atwater and/or Greektown and their affiliates, or any other person or entity which submitted any gaming proposal for voter approval prior to January 1, 1995, in the City of Detroit, or any other applicant who initiated or shall initiate any casino gaming proposal submitted

for voter approval in the city in which the casino will be located.

d. in the alternative to (a) and (b) an order declaring the entire Amended Act unconstitutional under Article I, Section 2 of the Michigan Constitution and the Fourteenth Amendment of the United States Constitution;

4(a). With regard to LVD's Fourth Claim for Relief, an order:

a. declaring those portions of the Amended Act which grant special privileges and immunities or deny LVD equal protection of the laws unconstitutional under Article IV, Section 29 of the Michigan Constitution;

b. severing those portions of the Amended Act which grant special privileges and immunities or deny LVD equal protection of the laws from the remaining portions of the Amended Act which do not violate the Michigan Constitution;

c. permanently enjoining Defendants from denying LVD equal protection of the laws or from granting special privileges and/or immunities to Atwater and/or Greektown and their

affiliates, or any other person or entity which submitted any gaming proposal for voter approval prior to January 1, 1995, in the City of Detroit, or any other applicant who initiated or shall initiate any casino gaming proposal submitted for voter approval in the city in which the casino will be located.

d. in the alternative to (a) and (b), to declare the entire Amended Act unconstitutional under Article IV, Section 29 of the Michigan Constitution;

5(a). With regard to LVD's Fifth Claim for Relief, an order:

a. declaring the Amended Act unconstitutional under the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Michigan Constitution; and

b. severing those portions of the Amended Act which violate the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Michigan Constitution from the remaining portions of the Amended Act;

c. enjoining Defendants from selecting eligible applicants or granting casino gaming licenses pursuant to the Amended Act;

d. in the alternative to subparagraph a and b, an order declaring the entire Amended Act unconstitutional under the Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Michigan Constitution.

6(a). With regard to LVD's Sixth Claim for Relief, an order:

a. declaring those portions of the Amended Act which delegate legislative authority to the City of Detroit unconstitutional under Article IV, Section I of the Michigan Constitution;

b. severing those portions of the Amended Act which unlawfully delegate authority to the City of Detroit from the remaining portions of the Amended Act;

c. in the alternative to subparagraph a and b, an order declaring the entire Amended Act unconstitutional under the Article IV, Section I of the

Michigan Constitution.

7. With regard to LVD's Seventh Claim for Relief, an order:

a. declaring those portions of the Development Ordinance which grant special privileges and immunities and deny LVD equal protection of the laws unconstitutional under the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Michigan Constitution;

b. severing those portions of the Development Ordinance which grant special privileges and immunities and deny LVD equal protection of the laws from the remaining portions of the Development Ordinance which do not violate the United States or Michigan Constitutions;

c. permanently enjoining Defendants from denying LVD equal protection of the laws, or granting special privileges and/or immunities to Atwater and/or Greektown and their affiliates, or any other person or entity which submitted any gaming proposal for voter approval prior to January 1, 1995, in the City of Detroit, or any other applicant who initiated or shall initiate

any casino gaming proposal submitted for voter approval in the city in which the casino will be located.

d. in the alternative to (a) and (b) an order declaring the entire Development Ordinance unconstitutional under Article I, Section 2 of the Michigan Constitution and the Fourteenth Amendment of the United States Constitution;

8. With regard to LVD's Eighth Claim for Relief an order:

a. declaring the Development Ordinance unconstitutional under the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Michigan Constitution; and

b. severing those portions of the Development Ordinance which violate the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Michigan Constitution from the remaining portions of the Development Ordinance;

c. enjoining Defendants, City of Detroit, Mayor Archer and the City of Detroit

Council Members from considering proposals for a casino development agreement and from selecting a prospective developer with whom the Mayor or his designee will negotiate a development agreement and further enjoining the Mayor or his designee from negotiating a development agreement pursuant to the Development Ordinance and/or the Amended Act;

d. in the alternative to subparagraph a and b, an order declaring the entire Development Ordinance unconstitutional under the Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Michigan Constitution.

9. With regard to LVD's Ninth Claim for Relief an order:

a. declaring those portions of the Development Ordinance which grant special privileges to Atwater and Greektown unconstitutional under Article IV, Section 29 of the Michigan Constitution;

b. permanently enjoining Defendants from granting special privileges or preferences to Atwater, Greektown

and/or their affiliates in the process of selecting developers with whom the City of Detroit, its May and/or its City Council will negotiate and execute a Development Agreement regarding the development and operation of a casino of casino complex and other matters relating thereto;

c. in the alternative to paragraph 9(a), an order declaring the entire Development Ordinance unconstitutional under Article IV, Section 29 of the Michigan Constitution.

10. With regard to all Claims for Relief, an order commanding Defendants City of Detroit, its Mayor and/or Council Members to permit LVD to submit a proposal for a casino development project in the City of Detroit pursuant to the Amended Act.

DATED this 18th day of August, 1997.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,
Plaintiff,

By /s/_____
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APPENDIX K

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

CASE NO. 2:97-CV-067
JUDGE ROBERT HOLMES BELL

[Filed October 24, 1997]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, THOMAS DENOMME, MICHAEL STACEY, PAULA BLANCHARD, RICHIE DAVIS, and KAREN BATCHELOR FARMER; and THE CITY OF DETROIT, MICHIGAN, DENNIS W. ARCHER, MARY ANN MAHAFFEY, GIL HILL, CLYDE CLEVELAND, SHEILA COCKREL, BRENDA M. SCOTT, NICHOLAS HOOD, III, ALBERTA TINSLEY-WILLIAMS, MEL RAVITZ, and KAY EVERETT,

Defendants.

ATWATER ENTERTAINMENT, L.L.C.;)
GREEKTOWN CASINO, L.L.C.; and)
FRANK J. KELLEY,)
ATTORNEY GENERAL, ex *rel*)
THE PEOPLE OF THE STATE OF MICHIGAN,)
)
Intervenor/Defendants.)
_____)

SECOND AMENDED COMPLAINT

Plaintiff, Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter "LVD"), alleges:

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief brought by LVD to declare the Michigan Gaming Control and Revenue Act, as amended, M.C.L.A. Section 432.201, *et seq.* (hereinafter the "Amended Act"), and Sections 18-13-1 *et seq.* of the Detroit City Code (hereinafter the "Ordinance") or portions thereof, in violation of the United States Constitution and the Constitution of the State of Michigan, to sever the unconstitutional portions of the Amended Act and Ordinance, if possible, from the remainder of the Amended Act and Ordinance, and to enjoin Defendants from taking actions which violate the United States Constitution and the Constitution of the State of Michigan under the authority and color of the Amended Act and Ordinance.

JURISDICTION AND VENUE

2. This is a civil action arising under the

Constitution and laws of the United States, and this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331.

3. This is a civil action to redress the deprivation under color of Michigan law, of rights, privileges and immunities of LVD and its individual members secured by the Constitution of the United States providing for equal rights of citizens or of all persons of any jurisdiction of the United States, and this Court has jurisdiction pursuant to 28 U.S.C. 1343(3).

4. This a civil action for declaratory judgment and injunctive relief pursuant to 42 U.S.C. § 1983, and this Court has jurisdiction pursuant to 28 U.S.C. § 1343(4).

5. With regard to claims in this Complaint arising under the Laws of the State of Michigan, such claims are so related to LVD's claims arising under the Constitution and Laws of the United States that such claims form part of the same case or controversy under Article III of the United States Constitution. Accordingly, this Court has supplemental jurisdiction over those claims in this Complaint arising under the laws of the State of Michigan pursuant to 28 U.S.C. §1367(a).

6. A substantial part of the events giving rise to the claims stated herein occurred in this district, and venue is proper in this district pursuant to 28 U.S.C. 8 1391(b).

7. This Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

PARTIES

8. Plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians is a federally recognized Indian Tribe with three hundred forty two (342) enrolled members, and is organized pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 476), as amended. LVD's Tribal Reservation is located in Gogebic County, Michigan.

9. The Michigan Gaming Control Board is a type 1 agency within the Department of Treasury of the State of Michigan, established and organized pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* The Michigan Gaming Control Board has the authority and duty to enforce and supervise the Michigan Gaming Control and Revenue Act.

10. Thomas Denomme is a resident of West Bloomfield, Michigan, and is Chairman of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Mr. Denomme is sued in his official and in his individual capacities.

11. Michael Stacey is a resident of West Bloomfield, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Mr. Stacey is sued in his official and in his individual capacities.

12. Paula Blanchard is a resident of West Bloomfield, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Ms. Blanchard is sued in her official and in her individual capacities.

13. Richie Davis is a resident of West Bloomfield, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *et seq.* Mr. Davis is sued in his official and in his individual capacities.

14. Karen Batchelor Farmer is a resident of Wayne County, Michigan, and is a member of the Michigan Gaming Control Board, an agency within the Michigan Department of Treasury, established pursuant to the Michigan Gaming Control and Revenue Act, M.C.L.A. § 432.201, *etseq.* Ms. Batchelor Farmer is sued in her official and in her individual capacities.

15. The City of Detroit is a municipality organized and existing in Wayne County, Michigan, under and pursuant to the laws of the State of Michigan.

16. Dennis W. Archer is a resident of Wayne County, Michigan, and is the duly elected Mayor of the City of Detroit. Archer is sued in his individual and official capacities.

17. Defendants, Mary Ann Mahaffey, Gil Hill, Clyde Cleveland, Sheila M. Cockrel, Brenda M. Scott, Nicholas Hood III, Alberta Tinsley-Williams, Mel Ravitz, and Kay Everett, all residents of Wayne County, Michigan, and are elected members to the City Council of the City of Detroit, Michigan, the governing body of the City of Detroit, Michigan. Defendants, Mahaffey, Hill, Cleveland, Cockrel, Scott, Hood, Tinsley-Williams, Ravitz, and Everett, are sued in their individual and official capacities.

GENERAL ALLEGATIONS

18. In July, 1990, LVD and several other Michigan Indian Tribes filed an action against the State of Michigan and Governor John M. Engler in the U.S. District Court for the Western District of Michigan, Sault Ste. Marie Tribe of Chippewa Indians, Et al. v. Governor John M. Engler, Case No. 1:90 CV 611, alleging failure to negotiate in good faith for a Class III gaming compact pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"). The State of Michigan was subsequently dismissed from the action. On August 20, 1993, the District Court entered a Consent Judgment which incorporated a stipulated agreement (hereinafter the "Stipulation") between the Tribes and the Governor which provided, *inter alia,* that the Tribes and the Governor would execute Class III gaming compacts which permitted the Tribes to operate, among other things, Class III electronic games of chance on Indian lands. The Stipulation provided that it would obligate and bind the parties thereto upon execution of Class III gaming compacts between the Governor and each Tribe, and upon concurrence by resolution of the Michigan Legislature.

19. The Stipulation further provided that the Tribes would make semi-annual payments to the Michigan Strategic Fund in an amount equal to eight percent (8%) of the Net Win at each casino derived from all Class III electronic games of chance so long as there was a binding Class III compact in effect between each Tribe and the State of Michigan which provided for the play of electronic games of chance, and only so long as the Tribes collectively enjoyed the exclusive right to operate electronic games of chance in the State of Michigan.

20. On August 20, 1993, Michigan Governor, John M. Engler, entered into compacts with the Tribes as provided in the Stipulation and Consent Judgment. In September, 1993, the legislature concurred in and approved the compacts and Stipulation by House Concurrent Resolution No. 439. The compacts were subsequently approved by the Secretary of the Interior, in accordance with IGRA.

21. Since 1993, LVD has continually been engaged in the business of casino gaming in Michigan, including the operation of Class III electronic games of chance and other Las Vegas type casino gaming.

22. LVD has arranged for the development of major casino resort development projects in the State of Michigan, including a project in conjunction with Full House Resorts, Inc., and GTECH Corporation for the development of a casino resort project in downtown Detroit, Michigan, which included a development in excess of two million (2,000,000) square feet of the former Hudson's Department Store, at a projected cost of Two Hundred Million Dollars ($200,000,000) to Three Hundred Million Dollars

($300,000,000). In addition, LVD has executed the development, finance and construction of a multi-million dollar casino, hotel, fine dining and golf resort that the Tribe currently owns and operates on its Reservation in Gogebic County, Michigan.

23. At all times relevant herein, LVD has been ready and has had the ability to submit the requisite information for a casino development proposal in accordance with the Request for Proposals/Qualifications issued by the City of Detroit on June 23, 1997, and Sections 18-13-1 through 18-13-11 of the Detroit City Code.

24. The revenues that LVD has derived from its Tribal government gaming operation have been used to combat conditions of extreme poverty that have existed on the Tribe's Reservation for decades. Prior to the advent of gaming, the unemployment rate on LVD's Reservation was eighty five percent (85%). LVD's gaming facility has been largely responsible for lowering the Reservation unemployment rate to fifteen percent (15%). Furthermore, the revenues that LVD has derived from its gaming operation have enabled LVD to provide essential government services to its members, including health care, education, housing, law enforcement and infrastructure development. Gaming revenues have enabled LVD to achieve greater Tribal self-sufficiency, and have reduced LVD's reliance on state and federal government assistance.

25. On November 5, 1996, the electorate of the State of Michigan approved a ballot initiative known as "Proposal E", which provided, *inter alia,* for the authorization, licensing and control of casino gaming

operations within the City of Detroit, and the regulation of casino gaming by the Michigan Gaming Control Board. 1996 MI Legis. Proposal E (West 1996). The adopted legislative initiative (Proposal E) was codified at M.C.L.A § 432.201, *et seq.*.

26. Although the Act was the result of an initiative, under Michigan law, "the power of initiative extends only to laws which the legislature may enact under [the Michigan] Constitution." Mich. Const. Art. 2 § 9.

27. On July 17, 1997, the Michigan Governor signed into law Senate Bill number 569, "A Bill to amend the initiated law of 1996, entitled 'Michigan Gaming Control and Revenue Act.'" (hereinafter the "Amended Act"). 1997 MI S.B. 569 (substituted version) (June 26, 1997).

28. The Amended Act establishes the Michigan Gaming Control Board (hereinafter the "Board"), consisting of five (5) members appointed by the Governor with the advice and consent of the Senate. The Board has the authority and duty to enforce and supervise the administration of the Amended Act, including the authority and duty to issue, suspend and revoke licenses to operate casinos.

29. The Amended Act grants the Board the general responsibility for the implementation of the Act, including deciding all casino license applications, promulgating roles necessary to implement, administer and enforce the Amended Act, licensing and regulating persons participating in or involved with casino gaming authorized under the Act, adopting standards for the licensing of all persons under the Amended Act, revoking or suspending licenses issued under

the Act, and delegating the execution of any of its powers under the Amended Act (with the exception of granting casino licenses pursuant to Section 6 of the Amended Act). 1997 MI S.B. 569 § 4(17)(A)-(D); IV(A)(1)(E), (K), (R).

30. The Amended Act limits the location of casino gaming operations to cities which meet the following criteria:

a. The City has a population of at least eight hundred thousand (800,000) at the time the license is issued;

b. The City is located within one hundred (100) miles of any other state or country in which gaming was permitted on December 5, 1996; and

c. The majority of the voters of the local unit of government have expressed approval of casino gaming in the City.

See 1997 MI S.B. 569 §2 (L).

31. The City of Detroit is the only city in the State of Michigan that meets the criteria set forth in the Amended Act, 1997 MI S.B. 569 §2(L).

32. Section 6(1) of the Amended Act sets forth criteria which applicants must meet prior to becoming eligible for a casino license. Section 6(1) of the Amended Act provides, in relevant part:

> The Board shall issue a casino license to a person who applies for a license, pays the non-refundable application fee required under Section 5(5) and a $25,000 license fee for the first year of operation, and who the Board determines is eligible and suitable to receive a casino license under this Act and the rules promulgated by the Board . . . A person is eligible to apply for a casino license if all of the following criteria are met:
>
> . . .
>
> (b) The applicant entered into a certified development agreement with the city where the local legislative body enacted an ordinance approving casino gaming.

Section 6(1)(B) of the Amended Act fails to provide standards or criteria which potential applicants must meet in order to be selected by the city, and thus become eligible to apply for a casino license.

33. Section 6(3) of the Amended Act provides:

> No more than three (3) licenses shall be issued by the Board in any city. In evaluating the eligibility and suitability of all applicants under the standards provided in this Act, the Board shall establish and apply the standards to all applicants in a consistent and uniform manner. In the event that more than three applicants meet the standards for eligibility and suitability

> provided for in subsections (4) and (5), licenses shall first be issued to those eligible and suitable applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

1997 MI S.B. 569 § 6(3).

At the time that the Amended Act was enacted, there were at a minimum two (2) known identifiable entities whom met the criteria set forth in the last sentence of § 6(3) of the Amended Act: Atwater Entertainment, Inc., and Greektown Casino, L.L.C., and their affiliates.

34. On June 18, 1997, the Detroit City Council unanimously approved an ordinance entitled, "An Ordinance to Amend Chapter 18 of the 1984 Detroit City Code by Adding Article XIII entitled 'Casino Development Competitive Selection Process.'" (the "Ordinance"). The Ordinance sets forth procedures and requirements that the City and potential casino license applicants must meet in obtaining a Certified Development Agreement, as described in Section 6 of the Act. Section 18-13-6(a) of the Ordinance provides:

> Sec. 18-13-6. Preference for Proponents of Gaming Proposals.
>
> (a) In considering proposals and in selecting a prospective developer with whom the Mayor or his designee will negotiate a

development agreement, a prospective developer is entitled to a preference if.'

> (1) Its proposal meets the criteria established by this chapter and by the request for proposals;
>
> (2) It was the initiator of a casino gaming proposal which was approved by the voters of this city prior to January 1, 1995;
>
> (3) It made significant contributions to the development of gaming within the city be actively promoting and significantly supporting a state initiative authorizing gaming.

35. Section 18-13-2 of the Ordinance defines "Preference" as used in § 18-13-6 as, "A more favorable position given to one prospective established to select, a designated developer."

36. The Ordinance was presented to the Mayor of the City of Detroit for approval on June 24, 1997, and was returned to the City Clerk neither approved nor vetoed by the mayor on June 30, 1997. Under the terms of the Charter for the City of Detroit, an ordinance returned to the City Clerk neither approved or vetoed by the Mayor shall be deemed enacted upon receipt by the City Clerk.

37. At the time the Ordinance was voted on and at the time that the Ordinance became effective there were, at a minimum, two (2) known identifiable entities who met the criteria set forth in § 18-13-6 of the Ordinance: Atwater

Entertainment, Inc., and Greektown Casino, L.L.C. and their affiliates.

38. Atwater and Greektown are entities which, like LVD, are engaged in, or plan to engage in, the business of casino gaming, including electronic games of chance, in the State of Michigan. LVD, Atwater and Greektown intend to engage in casino gaming, including electronic games of chance, as licensees pursuant to the Amended Act.

39. With regard to all claims for relief, LVD has no adequate remedies under the laws of the State of Michigan.

40. But for the preferences granted to Greektown and Atwater in the Ordinance and Amended Act, which prevent LVD from competing for a development agreement and casino license on equal footing with Greektown and Atwater, LVD would have submitted a proposal for a development agreement to the City of Detroit and otherwise have participated as an applicant in the selection and licensing process set forth in the Ordinance and the Amended Act.

FIRST CLAIM FOR RELIEF

41. LVD realleges and reincorporates paragraphs 1 through 40 herein by this reference.

42. The Stipulation, incorporated into the Consent Judgment, constitutes a contract under the laws of the State of Michigan.

43. In the Stipulation, LVD and the Governor agreed that LVD, along with six (6) other Michigan Tribes,

would collectively enjoy the exclusive right to operate Class III electronic games of chance in the State of Michigan, and, in return for said exclusive right, the Tribes would pay to the Michigan Strategic Fund eight percent (8%) of the Tribes' net revenues derived from Class III electronic games of chance. LVD has fully performed its obligations in accordance with the Stipulation.

44. Upon enactment, the Amended Act impaired, and continues to impair, the Tribes' collective and exclusive contractual right to operate Class III electronic games of chance in the State of Michigan. As such, the Amended Act violates Article I, Section 10 of the United States Constitution, and Article I, Section 10 of the Michigan Constitution.

45. As a direct and proximate result of the impairment of the Tribes' collective exclusive contractual right to operate Class III electronic games of chance in the State of Michigan, LVD has sustained and will continue to sustain damage in the form of increased operational costs, loss of employees, loss of customers and/or patrons, loss of good will, and loss of revenue derived from its gaming operation.

46. Unless enjoined, Defendants, Michigan Gaming Control Board, Denomme, Stacey, Blanchard, Davis, and Farmer, are compelled by the Amended Act to issue licenses for the operation of electronic games of chance to persons other than the Tribes, in violation of LVD's right of against impairment of obligation of contract, and in violation of 42 U.S.C. § 1983.

47. Unless enjoined, the Defendants, City of Detroit, Archer, Mahaffey, Hill, Cleveland, Cockrel, Scott, Hood, Tinsley-Williams, Ravitz, and Everett, are compelled by the Amended Act to select persons or entities other than the Tribes as eligible applicants for licenses to operate casinos and electronic games of chance. Such actions violate LVD's right against the impairment of obligation of contract secured by Article I, Section 10 of the United States Constitution, and Article I, Section 10 of the Michigan Constitution, and violates 42 U.S.C. § 1983.

SECOND CLAIM FOR RELIEF

48. LVD realleges and reincorporates paragraphs 1 through 47 herein by this reference.

49. The Stipulation incorporated into the Consent Judgment constitutes a contract under the law of the State of Michigan.

50. In the Stipulation LVD and the Governor agreed that LVD, along with six (6) other Michigan Tribes, agreed that the Tribes would collectively enjoy the exclusive right to operate Class III electronic games of chance in the State of Michigan, and in return for said exclusive right, the Tribes would pay the Michigan Strategic Fund eight percent (8%) of the Tribes' net revenues derived from Class III electronic games of chance. The State of Michigan ratified and concurred in the Stipulation in a House Concurrent Resolution No. 439 (Sept. 1993)

51. The exclusive right bargained for and secured by LVD in the Stipulation and Consent Judgment constitutes

a property right owned by LVD.

52. Upon enactment, the Amended Act destroyed and/or substantially impaired the Tribes' collective exclusive right to operate Class III electronic games of chance in the State of Michigan. As such, the Amended Act operated as a taking of the Tribes' collective exclusive right to operate Class III electronic games of chance in the State of Michigan.

53. The State of Michigan has not compensated LVD or any other Michigan Tribe for the taking of their collective exclusive property right to operate Class III electronic games of chance in the State of Michigan in violation of the Fourteenth Amendment to the United States Constitution and Article X, Section 2 of the Constitution of the State of Michigan.

THIRD CLAIM FOR RELIEF

54. LVD realleges and reincorporates paragraphs 1 through 53 herein by this reference.

55. The Amended Act gives preferential treatment to a narrow group of persons or entities by mandating that licenses for the operation of casino gaming in the City of Detroit, Michigan, be issued first by the Board to Atwater, Greektown and their affiliates. There is no legitimate or rational basis for mandating such preferential treatment.

56. The Amended Act is unconstitutional because it purports to grant special privileges and/or immunities to known identifiable persons who are in the same class as, and/or are similarly situated to, the Tribe, and, as such, the

Amended Act violates the Fourteenth Amendment of the United States Constitution, and Article I, Section 2 of the Constitution of the State of Michigan.

57. As a direct and proximate result of the special privileges that the Amended Act grants to persons or entities in the same class and/or similarly situated to the Tribe, the Tribe stands to sustain imminent irreparable harm and damage by being denied the equal protection of the laws of the State of Michigan, and by being denied the ability to compete for a casino license in the City of Detroit on an equal basis with those persons or entities which are granted such special privileges under the Amended Act.

58. Because the Amended Act mandates that Defendants grant special privileges to persons or entities in the same class and/or similarly situated to the Tribe, the Tribe has sustained and will continue to sustain harm in the form of increased operational costs, loss of employees, loss of customers/patrons of its casino, loss of good will, and loss of revenue derived from its casino business.

59. Unless enjoined by an order of this Court, Defendants are compelled by the Amended Act to accord special privileges and preferential treatment to persons in the same class as, or similarly situated to the Tribe, and to deny the Tribe the equal protection of the laws of the State of Michigan, in violation of Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, and Article I, Section 2 of the Constitution of the State of Michigan.

FOURTH CLAIM FOR RELIEF

60. LVD realleges and reincorporates paragraphs 1 through 59 herein by this reference.

61. LVD realleges and reincorporates paragraphs 1 through 50(a) herein by this reference.

62. The Amended Act grants special privileges to Atwater, Greektown and their affiliates by requiring the Board to issue casino licenses first to Atwater, Greektown and their affiliates for the operation of casino gaming in the City of Detroit pursuant to Section 6 of the Amended Act.

63. The Amended Act violates the prohibition against special legislation contained in Michigan Constitution Article IV, Section 29, by creating an arbitrary, unreasonable and capricious classification of persons or entities whom are to be granted special privileges not granted to other persons or entities whom, like LVD, are in the same class as Atwater, Greektown and their affiliates, and are in the same or similar circumstances to Atwater, Greektown and their affiliates.

FIFTH CLAIM FOR RELIEF

64. LVD realleges and reincorporates 1 through 63 herein by this reference.

65. The Ordinance gives preferential treatment to a narrow group of persons or entities by requiring that the Mayor of the City of Detroit give preferential treatment to a narrow group of persons or entities, namely Atwater, Greektown and their affiliates, in considering casino

development proposals and in selecting a prospective casino developer with whom the Mayor or his designee will negotiate a Certified Development Agreement. There is no legitimate or rational basis for mandating such preferential treatment.

66. The Ordinance is unconstitutional because it purports to grant special privileges, immunities and preferences to known identifiable persons or entities who are in the same class as, and/or are similarly situated to, LVD and, as such, the Amended Act violates the Fourteenth Amendment of the United States Constitution, and Article I, Section 2 of the Constitution of the State of Michigan.

67. As a direct and proximate result of the special privileges, immunities and preferences that the Ordinance grants to Atwater, Greektown and their affiliates, LVD stands to sustain irreparable harm and damage by being denied the equal protection of the laws of the State of Michigan, and by being denied the ability to compete for a casino license in the City of Detroit on an equal basis with such persons or entities whom are granted such privileges, immunities and preferences under the Ordinance.

68. Unless enjoined by an order of this Court, Defendant, City of Detroit, Mayor of Detroit, and members of the Detroit City Council are compelled by the Ordinance to accord special privileges, immunities and preferences to persons in the same class as, or similarly situated to, LVD, and to deny LVD the equal protection of the laws of the State of Michigan, in violation of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, and Article I, Section 2 of the Constitution of the State of Michigan.

SIXTH CLAIM FOR RELIEF

69. LVD realleges and reincorporates paragraphs numbered 1 through 68 herein by this reference.

70. The Ordinance deprives LVD of property without due process of law, in violation of LVD's due process rights under the Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Constitution of the State of Michigan, by mandating that the Mayor of the City of Detroit grant a preference to Atwater, Greektown and their affiliates in considering proposals and in selecting a prospective developer with whom the Mayor or his designee will negotiate a development agreement pursuant to the Amended Act.

SEVENTH CLAIM FOR RELIEF

71. LVD realleges and reincorporates paragraphs 1 through 70 herein by this reference.

72. The Ordinance grants special privileges to Atwater, Greektown and their affiliates by requiring the City of Detroit, the Mayor of the City of Detroit, and the members of the Detroit City Council to grant a preference to Atwater, Greektown and/or their affiliates in the selection of developers with whom the City of Detroit will negotiate and execute a Development Agreement.

73. The Ordinance violates the prohibition against special legislation contained in Michigan Constitution, Article IV, Section 29, by creating an arbitrary, unreasonable and capricious classification of persons or entities whom are to be

granted special privileges not granted to other person or entities whom, like LVD, are in the same class as Atwater, Greektown and their affiliates, and whom, like LVD, are in the same or similar circumstances as Atwater, Greektown and their affiliates.

EIGHTH CLAIM FOR RELIEF

74. LVD realleges and reincorporates paragraphs 1 through 73 herein by this reference.

75. The Amended Act grants preferential treatment to a narrow group of persons or entities by requiring the Michigan Gaming Control Board to give a preference in the licensing process to applicants which submitted any casino gaming proposal for voter approval prior to January 1, 1995, in the city in which the casino will be located and the voters approved the proposal.

76. These legislatively created preferences are granted as a reward for political and financial support to a particular political cause and rewards Atwater and Greektown for having successfully submitted a gaming proposal for voter approval in the City of Detroit and having the voters approve said proposal.

77. That said special preferences are a reward for supporting a particular side of a particular, controversial political issue, and because they either did not at all, or did not sufficiently support that particular side of this political issue, all other entities are denied this preference.

78. That awarding licensing preferences to entities for their political support of a particular side of a controversial political issue is in violation of the free speech and freedom of political association clause of the First Amendment, as incorporated into the Fourteenth Amendment of the United States Constitution.

NINTH CLAIM FOR RELIEF

79. LVD realleges and reincorporates paragraphs 1 through 78 herein by this reference.

80. The Ordinance grants preferential treatment to a narrow group of persons by requiring the City of Detroit, the Mayor of the City of Detroit and the Detroit City Council to grant preferences to those who took the initiative to facilitate the development of casino gambling in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City, and who actively promoted and significantly supported the State initiative authorizing gaming.

81. These special preferences are granted in return for providing political and financial support to a particular political cause and rewards Atwater and Greektown who facilitated the development of casino gambling in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City, and who actively promoted and significantly supported the State initiative authorizing gaming.

82. That said special preferences are a reward for supporting a particular side of a particular, controversial political issue, and because they either did not at all, or did

not sufficiently support that particular side of this political issue, all other entities are denied this preference.

83. That awarding of development agreements to entities for their political support of a particular side of a controversial political issue is in violation of the free speech and freedom of political association clause of the First Amendment, as incorporated into the Fourteenth Amendment of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, LVD respectfully requests that this Court:

1. With regard to LVD's First Claim for Relief, an order:

a. declaring the Amended Act illegal and unconstitutional under Article I, Section 10 of the United States Constitution and Article I, Section 10 of the Michigan Constitution; or

b. in the alternative to (a), an order declaring those portions of the Amended Act which purport to permit casino licenses to be granted to persons other than the Michigan Tribes who were parties to the Stipulation unconstitutional under Article I, Section 10 of the United States Constitution and Article I, Section 10 of the Michigan Constitution; to sever

such unconstitutional portions from the remainder of the Amended Act; and

c. with regard to casino gaming authorized under the Amended Act, permanently enjoining Defendants from issuing any casino or other licenses under the Amended Act to persons or entities other than the Tribes whom were parties to the Consent Judgment and Stipulation.

2. With regard to LVD's Second Claim for Relief, an order:

a. declaring the Amended Act illegal and unconstitutional under the Fourteenth Amendment to the United States Constitution and Article X, Section 2 of the Michigan Constitution; or

b. in the alternative to (a), an order declaring those portions of the Amended Act which purport to permit casino licenses to be granted to persons other than the Michigan Tribes who were parties to the Stipulation unconstitutional under the Fourteenth Amendment to the United States Constitution and Article X, Section 2 of the Michigan Constitution; to sever such unconstitutional portions from the remainder of the Amended Act; and,

with regard to casino gaming authorized under the Amended Act, to permanently enjoin Defendants from issuing any casino or other licenses to, or entering into any agreements with, under the Amended Act to persons or entities other than the Tribes whom were parties to the Consent Judgment and Stipulation.

3. With regard to LVD's Third Claim for Relief, an order:

a. declaring those portions of the Amended Act which grant special privileges and immunities and deny LVD equal protection of the laws unconstitutional under the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Michigan Constitution;

b. severing those portions of the Amended Act which grant special privileges and immunities and deny LVD equal protection of the laws from the remaining portions of the Amended Act which do not violate the United States or Michigan Constitutions;

c. permanently enjoining Defendants from denying LVD equal protection of the laws, or granting special privileges

and/or immunities to Atwater and/or Greektown and their affiliates, or any other person or entity which submitted any gaming proposal for voter approval prior to January 1, 1995, in the City of Detroit, or any other applicant who initiated or shall initiate any casino gaming proposal submitted for voter approval in the city in which the casino will be located.

d. in the alternative to (a) and (b) an order declaring the entire Amended Act unconstitutional under Article I, Section 2 of the Michigan Constitution and the Fourteenth Amendment of the United States Constitution;

4. With regard to LVD's Fourth Claim for Relief, an order:

a. declaring those portions of the Amended Act which grant special privileges and immunities or deny LVD equal protection of the laws unconstitutional under Article IV, Section 29 of the Michigan Constitution;

b. severing those portions of the Amended Act which grant special privileges and immunities or deny LVD equal protection of the laws from

the remaining portions of the Amended Act which do not violate the Michigan Constitution;

c. permanently enjoining Defendants from denying LVD equal protection of the laws or from granting special privileges and/or immunities to Atwater and/or Greektown and their affiliates, or any other person or entity which submitted any gaming proposal for voter approval prior to January 1, 1995, in the City of Detroit, or any other applicant who initiated or shall initiate any casino gaming proposal submitted for voter approval in the city in which the casino will be located.

d. in the alternative to (a) and (b), to declare the entire Amended Act unconstitutional under Article IV, Section 29 of the Michigan Constitution;

5. With regard to LVD's Fifth Claim for Relief, an order:

a. declaring those portions of the Ordinance which grant special privileges and immunities and deny LVD equal protection of the laws unconstitutional under the Fourteenth Amendment to the United States

Constitution and Article I, Section 2 of the Michigan Constitution;

b. severing those portions of the Ordinance which grant special privileges and immunities and deny LVD equal protection of the laws from the remaining portions of the Ordinance which do not violate the United States or Michigan Constitutions;

c. permanently enjoining Defendants from denying LVD equal protection of the laws, or granting special privileges and/or immunities to Atwater and/or Greektown and their affiliates, or any other person or entity which submitted any gaming proposal for voter approval prior to January 1, 1995, in the City of Detroit, or any other applicant who initiated or shall initiate any casino gaming proposal submitted for voter approval in the city in which the casino will be located.

d. in the alternative to (a) and (b) an order declaring the entire Ordinance unconstitutional under Article I, Section 2 of the Michigan Constitution and the Fourteenth Amendment of the United States Constitution;

6. With regard to LVD's Sixth Claim for Relief; an order:

a. declaring the Ordinance unconstitutional under the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Michigan Constitution; and

b. severing those portions of the Ordinance which violate the Fourteenth Amendment of the United States Constitution, and Article I, Section 17 of the Michigan Constitution from the remaining portions of the Ordinance;

c. enjoining Defendants, City of Detroit, Mayor Archer and the City of Detroit Council Members from considering proposals for a casino development agreement and from selecting a prospective developer with whom the Mayor or his designee will negotiate a development agreement and further enjoining the Mayor or his designee from negotiating a development agreement pursuant to the Ordinance and/or the Amended Act;

d. in the alternative to subparagraph a and b, an order declaring the entire Ordinance unconstitutional under the Fourteenth Amendment of the United

States Constitution and Article I, Section 17 of the Michigan Constitution.

7. With regard to LVD's Seventh Claim for Relief an order:

a. declaring those portions of the Ordinance which grant special privileges to Atwater and Greektown unconstitutional under Article IV, Section 29 of the Michigan Constitution;

b. permanently enjoining Defendants from granting special privileges or preferences to Atwater, Greektown and/or their affiliates in the process of selecting developers with whom the City of Detroit, its May and/or its City Council will negotiate and execute a Development Agreement regarding the development and operation of a casino of casino complex and other matters relating thereto;

c. in the alternative to paragraph 7(a), an order declaring the entire Ordinance unconstitutional under Article IV, Section 29 of the Michigan Constitution.

8. With regard to LVD's Eighth Claim for Relief an order:

a. declaring those portions of the Amended Act which violate the First and Fourteenth Amendments of the United Constitution unconstitutional;

b. severing those portions of the Amended Act which violate the First and Fourteenth Amendments of the Constitution of the United States from the remaining portions of the Amended Act;

c. enjoining Defendants Michigan Gaming Control Board, Thomas Denomme, Michael Stacey, Paula Blanchard, Richie Davis and Karen Batchelor-Farmer from granting casino licenses pursuant to the Amended Act;

d. in the alternative to subparagraphs a. and b., an order declaring the entire Amended Act unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

9. With regard to LVD's Ninth Claim for Relief an order:

a. declaring those portions of the Ordinance which grant special

preferences to Atwater and Greektown in violation of the First and Fourteenth Amendments of the United States Constitution unconstitutional;

b. permanently enjoining Defendants City of Detroit, Dennis W. Archer, Mary Ann Mahaffey, Brenda M. Scott, Nicholas Hood, III, Alberta Tinsley-Williams, Mel Ravitz, and Kay Everett from granting special preferences to Atwater, Greektown and/or their affiliates in the process of selecting developers with whom the City of Detroit, its Mayor and/or its City Council negotiate and execute a development agreement regarding the development and operation of a casino or casino complex and other matters relating thereto;

c. in the alternative, to paragraph 9(a), an order declaring the entire Ordinance unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

12. With regard to all Claims for Relief, an order commanding Defendants City of Detroit, its Mayor and/or Council Members to permit LVD to submit a proposal for a casino development project in the City of Detroit pursuant to the Amended Act, and for such other and further relief as the Court deems just and proper.

DATED this 19 day of September, 1997.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,
Plaintiff,

By_____

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APPENDIX L

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

CASE NO. 2:97-CV-067
JUDGE ROBERT HOLMES BELL

[Dated November 8, 1999]

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, THOMAS DENOMME, MICHAEL STACEY, PAULA BLANCHARD, RICHIE DAVIS, and KAREN BATCHELOR FARMER; and THE CITY OF DETROIT, MICHIGAN, DENNIS W. ARCHER, MARY ANN MAHAFFEY, GIL HILL, CLYDE CLEVELAND, SHEILA COCKREL, BRENDA M. SCOTT, NICHOLAS HOOD, III, ALBERTA TINSLEY-WILLIAMS, MEL RAVITZ, and KAY EVERETT,

Defendants.

ATWATER ENTERTAINMENT, L.L.C.;)
GREEKTOWN CASINO, L.L.C.; and)
FRANK J. KELLEY,)
ATTORNEY GENERAL, ex *rel*)
THE PEOPLE OF THE STATE OF MICHIGAN,)
)
Intervenor/Defendants.)
)

DECLARATION OF DENNIS W. ARCHER, MAYOR OF THE CITY OF DETROIT, IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Dennis W. Archer hereby declares as follows:

1. I am the Mayor of the City of Detroit.

2. I have personal knowledge of the facts recited in this Declaration and I am competent to testify to them if called as a witness in this matter.

3. The City of Detroit has suffered from very substantial population loss and economic disinvestment over the last few decades. Its population has declined from approximately. 1,850,000 in 1950, to 1,000,000 today. In addition, hundreds of businesses, which provided tens of thousands of jobs and a secure economic tax base, left the City during this time period. I have devoted a major part of my efforts as mayor to restoring the economic health and vitality of the City by attracting new businesses, stemming the decline of population and making the City a vibrant, welcome place for individuals and businesses.

4. In November 1996, the people of the State of Michigan passed a state-wide initiative called "Proposal E," which authorized three casinos in the City of Detroit. MCL 432.201 *et seq.* ("'Proposal E" or the "Act"). Since the enactment of Proposal E, the City of Detroit has been working diligently to implement casino gaming because of its importance to the economic revitalization of the City. Proposal E provides that the considerable tax revenues from casino gaming operations will be used for statewide K-12 education, and for police, health, and economic development funding in the host city. The casino developments are also expected to generate substantial additional economic benefits for the City of Detroit, as described below.

5. In February 1997, plaintiff instituted this suit, challenging the constitutionality of the preference in Proposal E. Plaintiff did not request a preliminary injunction until late summer of 1997, after the City was well under way in the casino developer selection process. However, plaintiff voluntarily withdrew the motion for preliminary injunction soon after the City filed its papers in opposition to the motion.

6. To implement Proposal E, in June 1997, the Detroit City Council adopted the Casino Development Competitive Selection Process Ordinance, Detroit City Code, § 18-13-1 *et seq.* (the "Ordinance"). Proposal E provided a "preference" for certain developers who had been expressly approved by the City voters and who had spearheaded the legalization of casino gaming in Detroit. The Ordinance also provided that a "preference" (defined as "a more favorable position") may be afforded to certain developers who had been expressly approved by City voters and who spearheaded the legalization of casino gaming in Detroit -- if they also met

all of the criteria set forth in the Ordinance and the request for proposals. Detroit City Code, § 18-13-6(a)(1). However, under the Ordinance, the preference was only one of many factors to be considered, and the Ordinance expressly provided that "the Mayor shall exercise his discretion in selecting and entering into negotiations with the three prospective developers whose proposals are deemed by the Mayor to be in the best interests of the City." Detroit City Code, § 18-13-7(a).

7. Later in June 1997, the City issued a Phase I Request for Proposals/Qualifications ("RFP/Q"), the availability of which had been advertised in the City's official notice paper, and which spelled out the rules for submitting proposals to develop a casino complex in Detroit. The RFP/Q established an August 1, 1997 deadline for submitting Phase I proposals.

8. In July 1997, the Governor signed into law seven bills that amended portions of Proposal E (the "Amended Act").

9. Eleven proposals were timely submitted in response to the Phase I RFP/Q, each accompanied by the required $50,000 fee. Plaintiff did not submit such a proposal (instead it amended its complaint, adding a challenge to the constitutionality of the Ordinance). As described in detail below, the City engaged in a rigorous and painstaking evaluation of the proposals in Phase I and Phase II. Among the eleven responses were proposals from several of the largest, most experienced, and well-capitalized gaming companies in the nation. Each proposed a major complex costing hundreds of millions of dollars that would include a

casino, a hotel, retail stores, entertainment facilities and restaurants.

10. The selection process was thorough, objective, and fair. I personally read and carefully considered each of the proposals. In addition, I assembled a team of City representatives and independent expert gaming consultants, who diligently analyzed the proposals. These consultants included the law firm of Shefsky & Froelich, Ltd. (special gaming counsel on the Casino Gaming Project), Oppenheimer & Co. (casino investment bankers), Berridge, Lewinberg, Greenberg, Dark, Gabor Limited (urban planners), Kimley-Horn Associates (casino traffic engineers), and Deloitte & Touche, L.L.P. (experts on gaming industry financial matters).

11. Prior to making and announcing my decisions at each stage of the process, I had extensive review with City representatives and the independent consultants to examine and consider their analyses of each of the pending proposals. I made the selection decision at each stage based on my assessment of which proposals would best serve the interests of the City of Detroit.

12. On August 22, 1997, I announced the elimination of four of the eleven proposals submitted in Phase I. At that time, I issued a Phase II RFP/Q to the remaining seven proposers, requiring additional detailed information. Upon receipt of the seven Phase II proposals in the fall of 1997, together with the $250,000 fee required of each, my team again embarked on an exhaustive analysis.

13. Based on this analysis of the merits of the Phase II proposals, on November 7, 1997, I announced that three of the proposals were eliminated: Barden Detroit Casino, L.L.C., Trump Motor City Hotel Casino, L.L.C., and Paradise Valley Rio, LLC. These proposals were inferior overall to the four proposals still in the running: Detroit Entertainment L.L.C. (a combination of Atwater Casino Group, LLC and Circus Circus Michigan Inc.) ("Detroit Entertainment"); Greektown Casino L.L.C. ("Greektown"); MGM Grand Detroit LLC ("MGM"); and MCD Gaming Corp. (Mirage Resorts). I also announced that the City needed to focus on and examine further certain issues in order to decide among these four proposals.

14. After further analysis, on November 20, 1997, I announced the final selection of Detroit Entertainment, Greektown, and MGM, with whom the City would negotiate development agreements. Mirage Resorts was eliminated.

15. The preference under the Amended Act and the Ordinance played absolutely no role in my decision narrowing the field of Phase I proposers to seven on August 22, 1997, or the field of Phase II proposers to four on November 7, 1997. Detroit Entertainment, Greektown, MGM, and Mirage merited advancement to the final four based solely on the quality of their proposals, without regard to any consideration of the preference.

16. Only in selecting *among* the four finalists on November 20, 1997 did the preference come into play; at that point, it did operate in favor of Greektown. Detroit Entertainment and MGM were selected as casino developers without regard to any preference.

17. On October 31, 1997, three weeks before I announced the three casino developers chosen by the City, this Court issued its Opinion and Order granting all of the defendants summary judgment. While plaintiff thereafter appealed this Court's decision to the United States Court of Appeals for the Sixth Circuit, it did not seek expedited review in that Court nor did it seek to enjoin, pending a decision by the Court of Appeals, the continuation of the casino selection process or the licensing and opening of casinos.

18. Given the favorable ruling by this Court that unqualifiedly supported the constitutionality of the Amended Act and the Ordinance, I believed that the City was fully justified in proceeding with the casino selection process and thereafter with negotiating and signing development agreements with the three successful developers.

19. My conviction in this regard was reinforced by the decision of United States District Judge Nancy Edmunds in the case of *New Century Detroit LLC, et al. v. The City of Detroit,* U.S.D.C. E.D. Mich. 97-75154. In that case the plaintiff had been one of the eleven initial proposers in the Phase I RFP/Q. After it was eliminated in the Phase I process, plaintiff sued asserting several constitutional claims. Just as this Court did, Judge Edmunds found no merit in *New Century's* First Amendment argument, and denied plaintiff's motion for preliminary injunction. Judge Edmunds later granted summary judgment to all defendants on a variety of grounds, incorporating her earlier ruling on the First Amendment issues.

20. I moved forward with the entire casino process for a very practical reason (besides having two favorable

district court rulings upholding the constitutionality of the Amended Act and the Ordinance): the City of Detroit was facing a severe decline in revenue that required immediate action. Bringing casino gaming to fruition as quickly as possible was an important factor in attacking this significant problem. I address this important matter further beginning at paragraph 33 of this Declaration.

21. The City has devoted substantial resources and effort to the casino project, involving thousands of person-hours expended by personnel spanning several departments. The developers have already invested enormous sums in their temporary and permanent Detroit casino ventures.

22. Immediately after the final selections were announced, the City began intense negotiations with each of the three successful proposers. In February 1998, I announced the Waterfront Reclamation and Casino Development Project ("Project") and designated a river view location ("Rivertown"), near the east riverfront, as the site for the permanent casino complexes. A comprehensive development agreement with each of the three selected developers was signed in March 1998 and approved by the City Council in April 1998. Each development, agreement requires the developer to construct, at its own expense, a casino gaming complex, including a gaming casino (initially having a maximum of 100,000 square feet), an at least 800-room hotel, restaurants, parking, and other amenities at the specified Rivertown site. The total projected cost of the three permanent casino complexes will exceed $1.8 billion. In or about late April 1998, after a public hearing, the City Council approved the geographic area for the Project, including the Rivertown location.

23. After the City Council's approval of the three development agreements, the City, pursuant to its obligations under the agreements, authorized preparation of extensive property appraisals, land surveys, relocation surveys, business appraisals, infrastructure analyses, and environmental assessments in the Project Area. In or about October 1998 and January 1999, the City filed with the City Clerk and the City Council, as a public record, schedules setting forth its good faith estimates of the costs of land acquisition, City infrastructure improvements, and environmental remediation related to the Rivertown casino complex site using the data described above.

24. In or about January 1999, after a public hearing, the City Council approved the Modified Project Plan as a formal project of The City of Detroit Economic Development Corporation ("EDC"), encompassing the Waterfront Reclamation and Casino Development Project Area as described in the Project Plan.

25. Thereafter, pursuant to my request, a resolution of necessity to acquire the property for the Project was submitted to the City Council. After a hearing was held, the resolution of necessity was adopted by the City Council in April 1999. At that time, the City Council also approved three land conveyance agreements among the City, the EDC, and each casino developer, respectively, under which, among other things, each developer agreed to purchase from the City the specified portion of land acquired by the City on which the developer will construct its permanent casino complex.

26. In May 1999, the City Council adopted a zoning ordinance permitting permanent casino complexes in

the Waterfront Reclamation and Casino Development Project Area.

27. Major financial commitments related to the City's land acquisition process have been made. In order to pay for the sites for the permanent casinos, the EDC raised approximately $150 million in proceeds of a bond offering in early May 1999. Re-payment of the bonds is guaranteed by letters of credit from the developers. The bonds were sold to institutional investors who relied upon these guarantees and the creditworthiness of the bonds in making their investment decisions as disclosed in the official statements that were issued with the bonds.

28. Since the City Council's adoption of the resolution of necessity, the City has updated appraisal reports for the Project and engaged additional appraisers and relocation consultants for purposes of preparing and submitting formal written good faith offers to property owners in the Project Area to initiate acquisition of the property for the Project either voluntarily or by using the City's power of eminent domain. The City began submitting written good faith offers to property owners in the Project Area in late May 1999. Since then the City's representatives have had numerous negotiation sessions with those property owners and have completed negotiations with some owners and executed purchase agreements as contemplated by the Uniform Condemnation Procedures Act. Beginning in August 1999, the City began filing actions against various property owners in the Project Area to acquire their properties by eminent domain. By order of the Honorable Michael Sapala of the Wayne County Circuit Court, the City has acquired title to a number of properties in the Project Area. Judge Sapala has

also ruled in favor of the City on its authority to condemn land for this Project under the Economic Development Corporations Act. The condemnation litigation is ongoing.

29. In or about mid-1998, the City determined that it would agree to allow the three developers to open temporary casinos. I made the decision to proceed with temporary casinos because the immediate financial advantage to the City and State is projected to be substantial, and the casino developers, consistent with industry practice, can use the temporary casinos to train for permanent casino operations and to build a customer base in the increasingly competitive environment in the casino gaming industry. The Windsor, Ontario casino has moved from a temporary to a permanent location, immediately opposite downtown Detroit. It is presently generating gaming revenue in excess of $400 million per year, 80% of which is estimated to come from United States residents (mostly from the Detroit metropolitan area). The recent highly successful opening of the MGM temporary casino and the anticipated openings of Motor City and Greektown temporary casinos will prevent the Windsor casino from cementing its dominance in the region, an occurrence which would have a significantly adverse impact on the Detroit casino gaming industry when Detroit's permanent casino complexes open for business.

30. Construction of the three temporary casinos began in late 1998 and MGM was licensed by the State and opened for business in late July 1999. The Motor City Casino is scheduled to have its licensing hearing in mid-November 1999 and is expected to open in early December 1999. The Greektown Casino is expected to open during the first quarter of the year 2000. Hundreds of millions of dollars have been

and are being expended to construct these temporary casinos, providing approximately 1,800 construction jobs and immediate economic benefits to the City and the State.

31. Submissions made by the three casino developers to and audited by the City reported that as of April 30, 1999 the developers had spent a combined total of $225 million on development of the three temporary casinos, almost $98 million, or 44%, of which were spent on Detroit-based, minority-owned and women-owned businesses; and as of April 30, 1999, a combined total of 490,779 construction worker hours had been invested in the three temporary casinos, approximately 151,000, or 31%, of which were performed by Detroit residents. These figures are from the City's Human Rights Department October 1999 report entitled "Review and Findings on the Detroit Casino Development Projects."

32. By conservative estimates, the three temporary casinos are slated to employ well over 5,000 full-time equivalent employees and to generate substantial numbers of other jobs in the area. MGM has reported 3,025 employees in its temporary casino operations, 53% of whom are Detroit residents (Human Rights Department October 1999 Report). Furthermore, it is projected that the City will receive $246 million and the State will receive $178 million in tax revenues from the temporary casinos over the three years they will operate.

33. Virtually irreversible tax and budgetary changes have been made by the City and State in reliance on the opening of the temporary casinos and the establishment of the permanent casinos.

34. The substantial population loss and economic disinvestment sustained by the City over the last few decades have imposed an enormous tax burden on Detroit citizens and businesses, placing the City at a further disadvantage as compared with suburban communities.

35. For many years the two largest revenue components of the City's general fund budget have been revenue-sharing from the State of Michigan and the income tax imposed upon City residents, non-residents who work in the City, and corporations who do business in the City.

36. Since I became Mayor in 1994, I have baffled to preserve the revenue-sharing formula used by the State of Michigan to allocate State funds to local units of government, including Detroit. Many members of the State Legislature desired to reduce Detroit's revenue-sharing allocation. Any such reduction would have disastrous consequences for the City, unless offset by revenues from other sources. One source that could not be pursued was to raise taxes. Detroiters are already the most heavily taxed citizens in Michigan. Increasing taxes would drive more residents and businesses out of the City, which is precisely the opposite of what the City needs.

37. Once Proposal E was adopted by the electorate, the desire of many members of the State Legislature to cut Detroit's revenue sharing increased significantly. Many legislators took the position that Detroit needed less from the State because, once the casinos opened, Detroit would receive substantial revenues from the gaming tax.

38. I was able to stave off these pressures in 1996 and 1997, but by 1998 many legislators had firmly decided that Detroit's allocation of revenue sharing would be reduced in 1999, with the expectation that taxes from casino gaming would fill the gap.

39. In late 1998, I had a series of meetings with Governor John Engler and members of the Legislature to address the threatened reduction in state revenue-sharing to the City of Detroit. I informed the Governor and legislators of the severe economic consequences to the City of a major decline in revenue-sharing, particularly in light of my desire to reduce the heavy tax burden on Detroit's citizens and businesses by instituting a gradual decrease in the City income tax rate on both.

40. I explained to the Governor and legislators that unless Detroit were able to reduce its high tax burden, individuals and businesses would continue to leave, further exacerbating the City's financial and social problems, to the detriment of the entire State of Michigan. I also pointed out that the City's ability to institute even modest tax reductions would have to be delayed for years if there was a simultaneous reduction in state revenue-sharing.

41. Ultimately, the Governor and the Legislature determined that state revenue-sharing dollars for Detroit would be frozen at the then current level (approximately $330 million annually), provided that the City reduces its income tax rate by 1/10th of 1% on residents and 1/20th of 1% on non-residents for each of the next ten years, beginning January 1, 1999. As a result, Detroit's income tax rate on residents will decline from 3% to 2% and on non-residents from 1.5% to

1% over the next ten years. Thus, all other factors being equal, Detroit is projected to lose in 10 years over $100 million in income taxes it receives annually from residents and non-residents.

42. In addition to statutory changes in Detroit's revenue-sharing allocation and individual income tax rate, the budget that I submitted to City Council for the current fiscal year (July 1, 1999 - June 30, 2000) provides for a gradual reduction in Detroit's income tax on corporations. This will entirely eliminate the corporate income tax (which currently accounts for $28 million of revenue) by January 1, 2009.

43. The foregoing changes in Detroit's tax structure and in its share of state revenue-sharing dollars were predicated on a fundamental assumption -- relied upon by the Governor, the Legislature and the City -- that the three temporary gaming casinos would open in the near future, and would produce approximately $51 million in gaming tax revenue and between $3 and $4 million of other tax revenue for the City during this fiscal year. This $54 million of anticipated revenue from the temporary casinos has been included in the budget approved by the City Council for the current fiscal year. Thus, any injunction that affects the opening or operation of the casinos would deprive the City of anticipated tax revenue for this fiscal year, causing a substantial shortfall in the City's budget. By law, the City cannot have a deficit budget.

44. Out of the total proposed general fund budget for Fiscal Year 2000 of approximately $1.4 billion, almost half ($664 million) is dedicated to support of the Police Department, the Fire Department, and the Department of

Public Works. A substantial shortfall in the City's budget due to delay in opening of the temporary casinos could require layoffs of City employees, including police officers, firefighters, and public works employees. Such layoffs would seriously erode the quality of life in the City of Detroit and reverse a series of recent positive developments.

45. The successful opening of the casinos is an important step in the revitalization of the City of Detroit. For example, the casino project was mentioned by Peter Karmanos, the founder and chief executive officer of Compuware Corporation, as an economic catalyst when he and I announced Compuware's agreement in principle with the City to move Compuware's company headquarters from a suburban Detroit location to the heart of downtown Detroit. The City is now in the final stages of negotiating a development agreement with Compuware.

46. The economy of the City of Detroit relies heavily upon tourism and convention business. However, our ability to attract tourists and conventions has been badly hampered by the lack of hotel rooms, sources of entertainment and an exciting downtown urban atmosphere. The expected opening of temporary, and then permanent, casinos has contributed to efforts of the Detroit Metro Convention and Visitors Bureau to sell Detroit as a bustling and desirable destination for visitors.

47. When the Sixth Circuit Court of Appeals rendered its decision in this case in April 1999, the City for the first time confronted a judicial decision casting doubt on the casino selection process. However, at that point the casino selection process was over and the casino project had

progressed far beyond the selection of developers (the final selections had been made almost a year-and-a-half earlier). As noted above, the State had already significantly altered Detroit's tax structure and, in my judgment, there was no chance to reverse those decisions made by the State. To stop the construction of temporary casinos or the acquisition of land for the permanent casinos was not a realistic choice, because the City needs the revenue these facilities are to provide. Indeed, the plaintiff in this case had never even suggested that construction of temporary casinos or land acquisition be halted. Recognizing that the Court of Appeals decision was interlocutory and still left open the issue of the legality of the preference, and recognizing that the plaintiff had not sought, and gave no indication that it would seek, preliminary injunctive relief, I determined that the best interests of the City lay in proceeding with all phases of the casino project. I knew that the selection process had been fair, it had still never been found to be invalid, and we had every right to proceed since no court had ever enjoined the casino project.

48. I also recognized in April 1999 that it would be unfair to urge the casino developers to continue pouring tens of millions of dollars into their projects if at some point a judicial ruling might affect the ability of one or more to open. For that reason, I agreed with the developers that if a final unappealable judgment disqualified any of them from opening and operating its casino (temporary or permanent) the City would require any new developer who stepped into the shoes of the disqualified developer to reimburse it for its sunk costs. I deemed this as an entirely appropriate agreement necessary to keep the casino projects moving forward.

49. As can be seen from the foregoing, an injunction halting the licensing or operations of the casinos will have a drastic adverse impact upon the City of Detroit and its one million residents. Millions of dollars of tax revenue, upon which the City is totally reliant, would be lost in the current fiscal year. Detroit would have to reduce its budget for this fiscal year to eliminate the deficit caused by the disappearance of such tax revenue.

50. While the loss of tax revenues would be severe, an injunction delaying the casino project would cause even more economic damage to the City in terms of lost jobs and lost business opportunities. Thousands of well-paying jobs (with training) for City residents who will work at the temporary casinos will be jeopardized. The indirect spinoff benefits of the casinos on many Detroit-based and local businesses will be delayed, if not entirely eliminated.

51. Any injunction interfering with or delaying the City of Detroit's casino project would be devastating to the City and cause its residents irreparable harm.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/_____
DENNIS W. ARCHER

DATE: November 8, 1999

APPENDIX M

In The Matter Of:

Barden Detroit Casino, L.L.C.	)
	)
v.	)
	)
The City of Detroit, et al.	)
	)

Dennis W. Archer
June 24, 1999

Pamela Moceri & Associates
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Original File DA O62 499.PRT,
90 Pages Min-U-Script®
File 1D: 1943574629

Word Index included with this Min-U-Script.

[p.1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BARDEN DETROIT CASINO, L. L.C.,
a Michigan Limited liability Company,
Plaintiff

v. No. 99-72655
Hon. Gerald E. Rosen

THE CITY OF DETROIT, et al,
Defendants

The Videotape Deposition of DENNIS W. ARCHER, taken before me, Pamela Moceri, CSR-2285, RPR, Notary Public, in and for the County of Oakland, Acting in the County of Wayne, Stale of Michigan, at 1126 City-County Building, Detroit, Michigan, on June 24, 1999 at 1:20 o'clock p.m.

APPEARANCES:

CARSON FISHER, P.L.C.
BY: ROBERT M. CARSON, ESQ.
300 East Maple Road
Third Floor
Birmingham, Michigan 48009

Appearing on behalf of Plaintiff.

OFFICE OF THE ATTORNEY GENERAL
CASINO GAMBLING Division
BY: ERIC J. EGGAN, ESQ.
1500 Abbott Road
Suite 300
Lansing, Michigan 48823

Appearing on behalf of State Defendants.

[p.2]

APPEARANCES CONTINUED:
BARRIS, SOTT, DENN & DRIKER, P.L.L.C.
BY: EUGENE DRIKER, ESQ.
211 W. Fort Street 15Ih Floor
Detroit, Michigan 48226
CITY OF DETROIT - LAW DEPARTMENT
BY: PHYLLIS A. JAMES, ESQ.
600 Woodward Avenue
Suite 1650
Detroit, Michigan 48226
Appearing on behalf of Detroit
Defendants.

Also Present: Donald Barden Nelson Westrin

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* * *

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MR. DRIKER: I just want to be careful that we're not having both questions and answers based on speculation. You're entitled to ask that question, and the Mayor should answer it, but I think, Mr. Mayor, with all due respect, I think you should confine your answers to things you know and don't guess.

MR. CARSON: Well, with whatever help that statement was, Mr. Driker.

THE WITNESS: I would presume that if there were any issues that were relevant and important to protect the interest of the City of Detroit, that there would be discussions between Beth Duncomb and Phyllis James. They had outside lawyers who were also available to them throughout the course,.and sense we started the issue of casino gaming following the November 5th, 1996 ballot initiative or

referendum that won statewide. So there have been outside lawyers.

The conversations that may have taken place I - can't tell you as I sit here if I remember any of them. And you're asking for conjecture, I would assume if there were some issues that were there they would have been discussed with Phyllis James or any other of the lawyers.

Q: Well, I'm really not asking for your conjecture, so I'd like to clarify that. I'm asking for your

[p.33]

understanding of whether it would have been her responsibility to come to you if somebody had raised, somebody from the Michigan Gaming Control Board had raised questions as to the legality or appropriateness of the preferences?

A:. Well, first of all, I want you to appreciate the following: Beth Duncomb's responsibility was -- started with the task force that I appointed following the '96 election, and then she began to negotiate after I had made my decisions and made a recommendation to City Council on the three.

The three would have been chosen, and in the capacity of negotiating, to the extent that the preference was considered, the preference was not considered until after there were four proposals left, and when I made the three recommendations out of the four, that was the first time that the issue of preference was even embraced or utilized. And so from. the standpoint of your original question as her responsibility for negotiating, the negotiation's aspect, the reference issue would have been gone by the wayside and her responsibility would be to negotiate an agreement with the

three proposed developers that I recommended to City Council.

Q: The preference aspect that I'm referring to has to do

[p.34]

with its' appropriateness or legality, not the timing of the negotiating with the developers.

A: I understand, but your question was in her responsibility as negotiating with the developers, that's the understanding that I got, and you can read the question back.

Q: My question to you was, would it have been part of her responsibility, I didn't say -- and I did not mean to, the record will be what it is.

A: Sure.

Q: But so the record is not confused w

A: Okay.

Q: -- I did not mean to say as a negotiator.

A: Okay.

Q: So as her responsibility in whatever her involvement was relating to casino gambling in the City of Detroit, if she became aware through advice from the Michigan Gaming Control Board of the potential illegality or inappropriateness of a preference, would she have been responsible to come to you and share that information with you?

A: I believe that there was. discussion that may have taken place by and between the parties. Whenever it may have come to me, if it came to me at all, was here is what has occurred as it relates to the vote of the people,

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anybody can understand that and see what was on the ballot. There was a lot of discussion that was ongoing, and I'm sure that Beth was privy to that and may have participated in some form or another with maybe Mr. Westrin. I'm sure with -- and I'm not even sure of that, I'm sure with the Governor's people, with the members of the state legislature, both in the House and the Senate, and the conclusion, if there is a conclusion, is one in which the people of the state of Michigan voted in favor of a referendum. The state legislature tracked in large measure the interest that was advanced in the referendum with perhaps a caveat, and then the City Council, came up with an ordinance that was to be based on competition, and it had in the ordinance reference to a preference along with other selected criteria to be considered by me. And if you take a look at the ordinance, the ordinance was not a mandate; that is to say the preference is not a mandate. The preference was there that if there was, all things being equal, and if those entitled to the so-called preference were all even up or pretty much even up with the people to be finally considered, then I could utilize, if I chose to, the preference.

On the other hand, if I chose not to use the preference, which was something that was clearly

* * *

[p.88]

A: Yes.

Q: Does the situs that you've chosen have that potential?

A: Oh, absolutely.

Q: And the fact that its bordered or almost bordered by the water does not affect the 360 degrees of development?

A: No. I'm sorry. No, it doesn't because on the 57 acres that will be utilized by -- I say 57, I think I'm accurate on that, will be utilized by the three casino developers has got ample space around it that they don't even get beyond if they get up to Atwater. I think they get to Atwater, but they don't go across Atwater at all. In fact, the desire is to have the green space to go from Joe Louis Arena down to Harbortown for recreational and public access and public use.

MR. CARSON: Thank you very much for making yourself available. Do you have anything that you want to put on the record, Gene?

MR. DRIKER: No, I don't think so.

MR. CARSON: Eric?

MS. JAMES: No, thank you.

VIDEO TECHNICIAN: DEPOSITION concluded at 3:47.

[p.89]

(Deposition Concluded at 3:47 p.m.)

[p.90]

STATE OF MICHIGAN)

)SS.

COUNTY OF OAKLAND)

CERTIFICATE OF NOTARY PUBLIC

I, PAMELA MOCERI, a Notary Public in and for the above county and state, do hereby certify that the deposition of said witness was taken before me at the time and place herein before set forth; witness was by me first duly sworn to testify to the truth; that thereupon the forgoing questions were asked and forgoing answers made stenographically and later reduced to typewritten form; and I certify that this is a true and correct transcript of my stenographic notes so taken.

I do further certify that I am not connected by blood or marriage to any of the parties, or their attorneys or agents; that I am not an employee of them, nor am I Interested directly or Indirectly in the matter in controversy either as counsel, agent, attorney, or otherwise.

PAMELA MOCERI, CSR-2285, RPR
Certified Shorthand Reporter
Registered Professional Reporter

Notary Public, Oakland County Michigan
My commission Expires: O8/O9/O2

APPENDIX N

In The Matter Of:

Lac Vieux Desert Band, et al.	)
	)
v.	)
	)
The Michigan Gaming Control Board, et al.	)
	)

John McGeshick
November 11, 1999

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Original File 111199JM. TXT,
68 Pages Min-U-Script® File ID: 2006196549

Word Index included with this Min-U-Script

[p.57]

A: Not really.

Q: All right. Turn to the last page of the letter, if you would, please, sir.

And you see the paragraph that starts, given this background?

A: Yes.

Q: I'm going to read that. Given this background, the tribe has requested that MP & E find a joint venture partner capable of financing and operating the project in Detroit, parenthetical, who may also be interested in the Pontiac concept, close parenthetical and to prepare and submit an application for the third gaming license to be issued in Detroit. Do you see that, sir?

A: Yes, I do.

Q: Did I read it accurately?

A: Yes.

Q: Did you understand that as of May 30th,1997 that the tribe was requesting a joint venture partner to finance and operate the casino in Detroit and to prepare and submit an application for a license in Detroit?

A: Yeah, we were always looking for some kind of partner. Q: Other than the fact that you couldn't find a partner, was there any reason why you couldn't have submitted the application?

A: No.

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Q: Look down at the last, next to the last paragraph, see where Mr. Peebles has written the size of the project has been estimated in the range of 200 to 400 million dollars

which would assist -- which would consist of a casino, motel, restaurants, ETC, did I read that correctly, sir?

A: Yes.

Q: Did you understand at that time that was the size of the project that you were looking for a joint venture partner to finance and operate, a casino?

A: If those are the numbers, then that's what we were going to go for.

Q: Okay. Now, if you would, please, turn to Exhibit 25.

MR. PEEBLES: Just a second.

(Q): (BY MR. PIRICH) I want you to look at the first page. The first page is a fax sheet from Monteau, Peebles, and Evans to Mr. Kolinsky from John, we assume it's John Peebles, and then attached to that is an outline of the City of Detroit's standards and requests for proposals and qualifications going forward. First of all, do you know Mr. Kolinsky?

A: Yes, I do.

Q: You work with him -- did you work with him when you were the tribal chair on a daily basis?

A: Yes.

Q: Did you have conversations with Mr. Kolinsky regarding an application for a license for a casino in the City of Detroit

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in the 1996, 1997 time frame?

A: Probably did.

Q: Do you recall ever discussing with Mr. Kolinsky the terms and conditions that are contained in this exhibit that were faxed to him from your lawyers?

A: Not specifically, no.

Q: Okay. Mr. McGeshick, do you know Bob Kolt or Robert Kolt?

A: Yes, I do.

Q: Could you describe who he is, please?

A: He -- I believe he works out of the City of Lansing, he's some type of public relations person, and he was -- he does some work for the tribe. I think he still does. I don't know.

Q: In the 1996 time frame, was Mr. Kolt employed by the tribe?

A: I don't recall the specific dates that he was brought on board, but I know he was.

Q: Was he employed in the 1997 time frame, if you recall?

A: I don't know.

Q: Do yell know what involvement Mr. Kolt had with regard to publicity associated with the lawsuit that this deposition is being taken in?

A: He was -- as pertains to this?

Q: As pertains to this lawsuit that was filed in the United States District Court, the Western District of Michigan, before the Honorable Robert Holmes Bell?

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A: Other than what we initially hired him for, I don't know -anything that pertained to this, but he was hired on as a public relations person for the tribe.

Q: Do you know if he engaged in providing public relations or communications services regarding this lawsuit in 1997?

A. Other than just kind of keeping an eye on what was

developing down in the Detroit area, I don'' know anything else.

Q: Do you know if he prepared any press releases or had any interviews relative to this lawsuit in 1997?

A: For the lawsuit, not specifically, no.

Q: Did Mr. Kolt work under your supervision, direction or control?

A: Not directly, no.

Q: Whose supervision, direction, or control did Mr. Kolt work under?

A: I believe Tom Kolinsky was the one that was the go-between the tribe and him, then Tom naturally would fill in at tribal council.

Q: I'm sorry, sir?

A: And Tom Kolinsky would relay anything to the tribal council.

Q: Mr. McGeshick, at the beginning of your examination today, Mr. Greene asked you a series of questions about your resignation from the tribe, resignation as tribal chair, do you recall those questions?

A: Yes, I do.

* * *

[p.65]

Q: Okay. Under Proposal E? I want to distinguish out the Hudson project.

A: Official acts by the council, I can't recall.

Q: Okay. But do you recall discussions in council meetings about going after a Detroit casino license?

A: Yes.

Q: Was there, was there any attempt made to evaluate the tribe's chances of success?

A: We figured if there was a license out there we'd go after it, we had a -- just as much chance as anybody else.

Q: Did you do any kind of study or evaluation of your likelihood of getting a license?

A: No.

Q: In the discussions, as best you can recall, was there any identification of, you know, possible obstacles or, for that matter, advantages, that the tribe may have had in getting a license?

A: Obstacles, advantages, no, not really.

Q: Okay.

A: We were just going after it like everybody else.

Q: Okay. Did the tribal council give its attorneys authority to file this present lawsuit?

A: Yes.

Q.: And when was that decision made?

A: I don't recall the specific date or the exact date.

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Q: Was it made at a tribal council meeting?

A: Had to be.

Q: Do you recall?

A: No, I don't.

Q: Prior to making that decision, did you talk to anyone other than your counsel about bringing such a lawsuit?

A: No.

Q: Consulted with no one else?

A: Not that I'm aware of.

Q: Does anyone other than the tribe have any kind of financial other interest in the outcome of this litigation?

A: Not that I'm aware of.

Q: Who pays your council attorneys' fees?

A: Tribal council, the tribe does.

Q: I'm sorry?

A: The tribe does.

Q: Anyone else contribute to the payment of your counsels' fees?

A: Not that I know of.

Q: Do you recall when Proposal E was up before Michigan's voters?

A: Generally, yeah.

Q: Generally, okay. Did the tribe take any position regarding whether Proposal E ought to pass or not?

MR. PEEBLES: Are you referring to an official position of the tribe.

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MR. CAVALIER: I'm talking about a position of the tribe, yeah. Did the tribe take any position on whether Proposal E ought to pass?

A: I don't think they did.

Q: Was that topic ever brought up in a tribal council meeting?

A: Not that I know of.

Q: Did the tribe -- did any tribal council member ever express an opinion about whether, you know, Proposal E was a good thing or not?

A: Other than everybody should have gaming, that's about it. Q: Those comments were made in tribal council meetings?

A: Gaming is good for everybody.

Q: Okay. That was the tribe's view?

A: Basically.

Q: Well, did the tribe make any contributions to the campaign for Proposal E?

A: I don't think so.

Q: Do you know of any, tribal members individually who made contributions, including yourself?.

A: No.

Q: Are you aware that your tribe has filed a motion for a preliminary injunction in this case?

A: I guess, I mean this is what's going on, I don't know.

Q: Are you aware of it?

A: Yeah.

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Q: If you're not that's fine?

A: I guess.

Q: Do you know what a preliminary injunction is?

A: Not really.

MR, SMIT: Ignorance is bliss sometimes.

Q: (BY MR. CAVALIER) Did you make -- while you were tribal chairman, did you make any effort, yourself, to monitor the casino, the Detroit casino process?

A: No, not really.

Q: Did you rely on someone else to do that?

A: Basically, yes.

Q: Was that Mr. Kolinsky?

A: Kolinsky, yes.

MR. CAVALIER: Thank you, sir.

MR. PEEBLES: I have nothing.

MR. GREENE: We have no further questions.

MR. PEEBLES: We have nothing.

MR. EGGAN: I have no questions, thank you.

MR. HARTMAN: This will conclude today's deposition of Mr. John McGeshick. We are going off the record, the time now 1:59 p.m.

(Whereupon, Deposition concluded.)

APPENDIX O

In The Matter Of:

Lac Vieux Desert Band, et al.	)
	)
v.	)
	)
The Michigan Gaming Control Board, et al.	)
	)

Thomas J. Kolinsky
Vol. 1, November 10, 1999

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Original File 111099TK. TXT, 116 Pages
Min-U-Script® File ID: 3453883744

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[p.13]

have in my hands a draft order, which I believe has. been signed by Timothy Greeley, but I don't know that for certain, and this is as a result of our telephonic hearing on Monday, November 8, 1999. I believe that was the date during which time we addressed our disagreements over the documents to be produced, and We submitted a draft order. I don't know that you have any objections to it, or at least I haven't heard, and we attached to it the subpoena duces tecum, that portion of the subpoena or the notice of taking deposition duces tecum that related -- that listed the documents that we sought, and that was to be attached to the order, and it's a list of 13 documents.

Documents number, listed number 12 and 13 are the document categories that I'm addressing with this question.

MR. PEEBLES: Bruce, could I look at the order? I quite frankly, there were a number of drafts that had gone back and forth, and I don't know which draft you have and –

MR. GREENE: Sure. John, I cannot represent to you that this has been signed, but I don't have any reason to believe that it has not been signed.

MR. PIRICH: If I could add to Mr. Greene's statement, the attachment has not been changed in any of the drafts. The attachment was the attachment that we sent last Friday, or Monday morning, I can't remember the exact time it was sent, and after the ruling by the Court on Friday,

[p.14]

November the 5th, and there have been no change to the attachment with regard to production.

MR. PEEBLES: I see. It's my understanding that paragraph number 1 was to have been deleted from this order, at least my discussions --

MR. PIRICH: That is correct, that is my understanding.

MR. PEEBLES: That this paragraph number I should not be in there.

MR. PIRICH: That's not an executed copy. I don't think any of us have received an executed copy back from Judge Greeley unless you have.

MR. PEEBLES: No, we haven't. In fact, I haven't even seen the final draft that went over to Greeley.

MR. SCHULTE: No.

MR. GREENE: If I can have it back for just a second. You're referring to paragraph 1 of the proposed order, is that right?

MR. PEEBLES: Yes.

MR. GREENE: Right, I believe that's right. Paragraph 1 states: Plaintiffs stipulated that it did not file an application for a casino pursuant to the City of Detroit's

request for proposal and qualifications either phase one or phase two.

Is there an issue about that? It just says you did not

[p.15]

file an application.

MR. PEEBLES: I understand that. 1 don't think there is, but the point of it is, it was not to be in that order. That was my point.

MR. GREENE: That's your recollection as well?

MR. PIRICH: As I understand from the discussions, the Magistrate Judge asked if that would be stipulated to. I understood it would. It was prepared in that fashion. I understood from your review, Mr. Peebles, of the original draft order that you wanted that taken out.

MR. PEEBLES: Actually, I believe it came from Mr. Driker's office to remove that paragraph 1, and that came from Morley Witus was my understanding, and we agreed to that, and in my conversation with John Kane, he agreed with that.

MR. PIRICH: My Conversation was that the information came from you. Whether it came from Mr. Driker also, I do not know that.

MR. PEEBLES: That's what he told me. I haven't talked to Driker about this.

MR. PIRICH: Nor have I.

MR. PEEBLES: Anyway --

MR. GREENE: I don't know what to say about paragraph 1 and what conversations took place between you all, or whomever, representing the plaintiff and Mr. Driker,

[p.16]

but just as a question, is there an issue about whether Lac Vieux filed an application for a casino pursuant to the City of Detroit's request for proposal and qualifications, either phase one or two?.

MR. PEEBLES: No. I don't think there is an issue on that.

MR. GREENE: Okay. Now, what I'm referring to is the attachment to the proposed unsigned order.

MR. PEEBLES: Okay.

MR. GREENE: And it is a list of the documents that were contained on the notice of deposition duces tecum that was served by John Pirich's office, and I guess I have two questions. I do have two questions.

One is, I understood from a previous conversation that there are no documents in response to items number 12 and number 13, and I will read those into the record.

12 is all documents relating to any person, which includes any individual or group of individuals or any business entity of any kind, other than the named plaintiff,

who has any pecuniary or other property or legal interest whatsoever in the outcome of this litigation, if favorable to the plaintiff.

And I believe you had represented that there were no documents because there was no individual or group or business entity that fell into this category.

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MR. PEEBLES: We have not found any documents that relate to that at all, and I know of none.

MR. GREENE: And the same question I have for item number 13, which reads as follows: All documents relating to any person, which includes any individual or group of individuals or any business entity of any kind, other than the named plaintiff, who was financing all or part of this litigation, in whole or in part, on behalf of the named plaintiff or any other person who has an interest in its outcome, ff favorable to the named plaintiff.

MR. PEEBLES: We have no documents with regard to that at all.

MR. GREENE: And with respect to the balance of the list of documents contained in paragraphs 1 through 11, is it your representation to us today on the record that the documents you supplied to us this morning, at the Varnum Riddering office, offices, is fully responsive to items 1 through 11?

MR. PEEBLES: Bruce, we've done our best to get as many documents to be as fully responsive as we possibly can.

MR. GREENE: I guess my question is, it's two questions. Are there any more documents that you believe exist that you have not previously supplied to us this morning?

MR. PEEBLES: Bruce, there is -- if you talk -- we

[p.18]

gave you -- let me give you an example. We gave you financial statements. There is all of those documents that were-- that the financial statements were compiled from. We have not produced a casino full or truckloads full of those documents. We couldn't in the short period of time, if we had to, so 1 mean, any and all documents, when you say that, there may be records upon which the financial statements are being prepared that we have not produced today, but those are the financial statements of the casino and of the tribe.

With regard to tribal minutes, we have done an extensive investigation of the records and we have compiled what we believe to be an exhaustive list.

MR. GREENE: Is that true, essentially, with the balance of the paragraphs?

MR. PEEBLES: Let me make sure that I go through that.

Yes. We made -- let's put it this way. We made a reasonable inquiry and everything that we think is within -- that we had that we produced for you.

MR. GREENE: There is no objection to any of the categories that you have at this point, other than ones you

previously raised with the Magistrate, which he resolved?

MR. PEEBLES: Yeah. We would certainly stand on the previous objections that we've made. I'm not going to waive those objections at all.

[p.19]

MR. GREENE: But there are no other objections that --

MR. PEEBLES: I don't -- at this time, no.

MR. GREENE: Okay, okay. Would you swear the witness, please.

THOMAS KOLINSKY,
having been first duly sworn, testified as follows:

EXAMINATION
BY MR. GREENE:

Q: Mr. Kolinsky, it's nice to see you.
A: Thank you.
Q: This is a deposition that we're taking pursuant to the Federal Rules of Civil Procedure in a lawsuit that your employer has brought.
Are you generally familiar with that lawsuit?
A: Yes, I am.
Q: Have you had your deposition taken previously?
A: Ah, I did an affidavit. That was about it. I don't know if that counts asa deposition or not.
Q: It does not.

Q: I just want to make sure you understand what the rules are here. We're going to be asking you some questions. You're under oath to tell the truth. I don't want you to answer any question that you don't understand.

[p.20]

A: Good.

Q: I want to make sure that you understand what it is we are asking of you. There may be more questioners than me. We'll try to not bombard you with questions from all sides of the table. If you are fatigued in any way and need a short rest, just let us know, but I want to make sure that when you do answer a question, it's because you've understood the question, and if you don't understand it, please ask me to try to restate it so that it makes sense.

A: Okay.

Q: Now, Mr. Kolinsky, you are employed by whom?

A: Lac Vieux Desert Band of Lake Superior Chippewa Indians, Watersmeet, Michigan.

Q: You have been in that employment for how long?

A: Since May of 1990.

Q: I'm looking at a document, which is entitled Affidavit of Tom Kolinsky. It is identified as Exhibit 9. It is -- appears to be an exhibit attached to the Lac Vieux Desert's motion for preliminary injunction. It has certain attachments to it.

Are you familiar with that document?

A: Yes, I am.

Q: I know there is a description here of your job responsibilities, but I wonder if you could give us a general sort of overview of what you do for the tribe?

* * *

[p.37]

moment, how would you explain Rio going ahead, in fight of your previous testimony in which you indicated that these developers did not want to proceed because they thought they were only competing for one license?

MR. PEEBLES: Objection to speculation.

THE WITNESS: I just --

MR. GREENE: I'm asking the witness if he has any knowledge. He just testified–

THE WITNESS: I don't have any knowledge of conversation that Mr. Evans had with Rio. I'm just speculating, that's all.

Q: (BY MR. GREENE) Does it surprise you that Rio went ahead and applied?

A: Yes.

Q: Can you tell me, briefly, do you have an understanding of the city ordinance, selection ordinance that is at issue in this litigation?

A: General understanding of it, yes.

Q: You've mentioned a preference, can you tell me how that works, to your knowledge?

A: It was basically laid out where there was two processes. The groups that supported and funded the initiative referendum vote would have a preference and the -- if they were interested, and if there were other bidders, then those

bidders would be decided on by the mayor and the council.

[p.38]

Q: So is it your testimony, based on your understanding of the ordinance, if there were two separate tracks that applicants fell into?

A: Pardon?

Q: Two separate tracks that applicants fell into, either the group that were entitled to a preference and the group that applied that were not entitled to a preference, is that your testimony?

A: Pretty much so,

Q: Just to -- perhaps we've covered this already, but well, let's -- I'm looking at a document that is attached to the affidavit of John McGeshick, and it is entitled, Request for Proposals/Qualifications Phase One. This is a document that you're generally familiar with?

A: Yes.

MR. PEEBLES: Could we look at it?

MR. GREENE: Sure. Let me put something in here to keep my place.

THE WITNESS: Yeah, I'm generally familiar with it. We leave that up to -- a lot of that up to the attorneys.

MR. GREENE: Why don't I --

MR. PEEBLES: Do you have another one?

MR. GREENE: Can we use yours just because I have a few markings?

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MR. CAVALIER: I've got one. Is this what you need?

MR. PIRICH: Okay. Go ahead.

MR. GREENE: Yes.

MR. PEEBLES: Are you going to mark this?

MR. GREENE: Well, it's attached to your affidavit, I don't know if we need to mark it. Yon can give him both, phase one and phase two.

MR. CAVALIER: I've just got- I think this is phase one only.

Q: (BY MR. GREENE) Do you have any knowledge about a casino advisory committee?

A: No.

Q: You're, therefore, not aware of the fact that the mayor has appointed a casino advisory committee, which submitted a lengthy, technical, and complex report to the mayor regarding the casinos in Detroit?

A: I vaguely, vaguely recall that.

Q: Is that a document that you reviewed at any time or --

A: What, which one?

Q: The report of the casino advisory committee?

A: No. I'm not an attorney and that's something that we felt, the Council felt that should go to the attorneys, the RFP included.

MR. PIRICH: I'm sorry, you're going to have to

[p.40]

speak up and –

THE WITNESS: I'm not an attorney, and they, the council, thought that items such as the RFP should go to attorneys.

MR. PIRICH: When you say council, you're referring to the tribal council, not counsel of lawyers, is that correct?

THE WITNESS: Tribal council, tribal council, yes.

MR. PIRICH: Thank you.

Q: (BY MR. GREENE) Did you understand the casino advisory report to be a legal document?

A: I have no idea, I have no clue.

Q: This RFPQ phase one is a document that you are generally familiar with?

A: Vaguely familiar with.

Q: Vaguely.

A: I won't say generally familiar with.

Q: Okay. Was there any process internally by the tribe to attempt to comply with any of the terms and provisions of the RFPQ phase one?

A: We basically looked for partners to do this with us, and that's as far as it went.

Q: Okay. So you looked for partners, you were unable to find partners willing to partner up with you, but as

far as the RFPQ phase one and the questions that it asked and the

* * *

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Q: Because of the preference clause?

A: Yes.

Q: Could you have submitted a proposal, could LVD have submitted a proposal on its own and financed a 2, 3, 4 or 500 million dollar proposal?

A: Not on our own, no. We needed a partner and we could not get a partner because -- well, it was the preference clauses again, I believe.

Q: You believe that?

A: Yes.

Q: And that's just a belief, is that correct?

A: No. We were told that by different parties that we contacted.

Q: Who told you that, sir?

A: Well, attorneys' firm, law firm.

Q: I beg your pardon, sir?

A: The law firm, Peebles and Evans.

Q: Your law firm told you that you couldn't get a partner because of the preference clause?

A: That they were having trouble getting anybody to go on this because of the preference clauses.

Q: Do you have any knowledge of any developer who provided information to the tribe that they would not co-venture or joint venture with you because of the preference clause?

A: Personally?

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Q: You, sir, yes, sir.

A: No, I don't.

Q: Thank you. Did you ever see any letters or statements reduced to writing from any proposed joint venturers or co-venturers in regard to the City of Detroit proposal in regard to that issue?

A: Any written?

Q: Yes, sir.

A: No.

Q: You met with the representatives of Sun and --

(Off the record discussion.)

Q: (BY MR. PIRICH)You met with representatives of Sun and Mohegan, is that correct?

A: I was at their casino in Connecticut, yes.

Q: And the Sun and Mohegan proposal, is that the same proposal that was referred to in regard to Trading Cove Associates in Waterford, Connecticut, or is that a different proposal?

A: I believe that's the same proposal.

Q: Okay. Did the meeting in June of 1997 with either Trading Cove or Sun or Mohegan result in a joint venture or co-venture proposition with LVD to submit a proposal in Detroit?

A: From what I remember, they were going to look at it and get back to us, and they got back to Dan Evans and said that they were not interested. The time constraints were too tight for

[p.87]

them, and the preference clauses -- or instead of going for one, they were going for -- instead of going for one of three, they were going for one of one against 12 others, or whatever it was.

Q: You heard that, sir?

A: That's what kind of was relayed to me.

Q: Kind of was relayed to you?

A: But it didn't come directly from the Mohegans.

Q: When you met with Mr. Wolman or other representatives of Trading Cove or --

A: They didn't respond to me individually.

Q: Can I finish now?

A: Sure.

Q: Thank you. When you met with representatives of Trading Cove or with Sun or Mohegan, did any of the discussion at that meeting say we're not going to be able to submit a proposal because of the preference clause?

A: I don't believe so at that meeting:

Q: And do you know why these individuals were not contacted until June of 1997 with a filing deadline of August 1?

A: No, I do not.

Q: Do you know when the law firm was given instructions to seek a co- or joint venturer for the Detroit project from the tribal council?

A: Oh, I believe it was in May.

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Q: In May of 19 -

A: '90 -

Q: 7?

A: 7, yes.

Q: Do you know why, from the filing of the lawsuit in February until May, the tribal council didn't decide to proceed forward with the co-venture or joint venture in regard to the Detroit proposal?

A: I don't have any idea why not.

Q: Do you know of any reason why they couldn't have started the process much earlier?

A: No.

Q: Did you ever ask any of the tribal representatives about that?

A: No, I did not.

Q: Thank you. And in regard to the phase one and phase two RFPQ proposals, did you know of any use of the preference to determine applicants moving on to the second or third phase, you personally, do you have any knowledge of that happening?

A: Of them

Q: Of the City of Detroit or the mayor using the preference provision to in any way decide which applicants would move onto the second or third round of consideration?

A: No specific knowledge.

MR. PIRICH: Thank you. I have no further

* * *

[p.93]

discussion had already been held by the council.

Q: What I want to know is what Mr. McGeshick told you about the discussion?

A: That they were going to try to still go after Detroit, basically, after a license.

Q: You mean try to go after a casino in Detroit?

A: To keep things open, to keep at least the possibility open of getting in Detroit. We had been working on it for three, or four years off and on,.and this was a possible last gasp, last chance.

Q: Was the Detroit casino he was talking about a casino pursuant to Proposal E?

A: In '96?

Q: Yes.

A: Yes.

Q: Okay. Did Mr. McGeshick relate to you any advantages or disadvantages to going forward that had been identified by the tribal council in their meeting?

A: Not in particular.

Q: The only thing you remember about this conversation is that Mr. McGeshick told you that the tribe wanted to keep the door open to pursuing a casino in Detroit?

A: Yes, that's it.

Q: That's all you remember of that conversation?

A: Yeah.

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Q: We've talked about the RFPQ, and I wanted to ask you some questions about the RFPQ phase one. I think you have a copy of it somewhere.

A: Uh-huh.

Q: Now, sir, if you turn to the first page, it says, issued June 23, 1997 by the City of Detroit?

A: Yes.

Q: Do you see that? Did you receive a copy of this

shortly after it was issued?

A: I believe we did.

Q: Well, did you personally -- when did you personally first receive it?

A: I don't recall. I don't remember where we got it from.

Q: You don't remember?

A: No.

Q: Okay.

A: I don't know if the law firm got the RFP or how that happened, I don't recall.

Q: Okay. A copy was provided to you?

A: Yes. Q: And --

A: And I'm not sure where it came from. I don't remember where it came from, or if I was party to the knowledge of where it came from.

Q: But it got into your possession at some point?

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A: I had -- I looked at it, along with other council members and -- yes.

Q: Did you review it?

A: Yes.

Q: Did you read it from front to back?

A: Yes, I did.

O: Okay. And you discussed it with other -- did you discuss it with tribal council members?'

A: Yes, I did.

Q: Who did you discuss it with?

A: I believe John McGeshick and -- I don't know who the other James Williams, I believe, Jim Williams.

Q: Okay. Was this a discussion within a tribal council

meeting or just a --

A: No, just a casual conversation.

Q: In that discussion, did you talk about how you were going to go about preparing the proposal that was required?

A: No.

Q: What did you discuss?

A: The need for a partner.

Q: The need for a partner or to present a proposal?

A: Yes.

Q: Anything else that you discussed with them?

A: The time constraints.

Q: You understood that you had to submit a proposal for phase

[p.96]

one by August 1st, 1997?

A: Yes.

Q: And you talked that over with them?

A: Yes.

Q: Anything else you 'discussed with them about the RFPQ phase one?

A: Boy, that's very general. I don't recall anything that stands out.

Q: Okay. So you've told me everything that you remember, then, about those conversations?

A: Yes. We went through it, looked at it, and just had a general conversation regarding the phase one and -- well, we had been working trying to get a partner so we could do it.

Q: So is it fair to say that all the tribe's efforts, with respect to the RFPQ, was targeted at getting a joint venture partner?

A: And working with the law firm.

Q: Towards that end?

A: Yes, and towards possible preparation of a proposal, I'm sure, but it was essential that we had partners.

Q: If you go to page 18 of the RFPQ, you will see here that beginning at 1 A, there are a list of exhibits that the city is requesting the proposer prepare. Do you see that, sir?

A: Yes.

Q: Okay. That continues, I believe, through, basically, through

* * *

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A: No, but we had information available regarding that.

Q: Information about what?

A: The costs associated.

G: With the Detroit casino, pursuant to the RFPQ?

A: Not the Detroit casino, per se, but to a casino in Detroit.

Q: You're talking about the Hudson project?

A: Yeah.

C: That was a 91,000 square foot casino?

A: The casino was, yes.

Q: Okay. Isn't that significantly smaller than the casinos that are contemplated in Detroit?

A: Yes, yes.

Q: Under-Proposal E?

A: Yes.

Q: Okay, all right. So what you're talking about is -- axe figures that were developed for a much smaller casino, correct?

A: Yes.

Q: All fight. The figures for a casino that would be built pursuant to the RFPQ would be much larger, correct?

A: Correct.

Q: .You hadn't prepared those?

A: No.

Q: Also, the proposer is to provide an estimate of revenues, expenses, and profits for the first seven years of the

[p.102]

operation of the casino complex.

Did you ever provide -- ever begin to prepare that estimate?

A: No.

Q: Your attorneys, I take it, didn't, either, as far as you know?

A: Not to my knowledge.

Q: Okay. If you turn to 30, item G is a list of consultants and advisers. Did LVD ever contact any, let us say, market analysts, with respect to the Detroit casino?

A: On this project?

Q: On this project, yes?

A: No.

O: Ever contact any architects?

A: No.

O: Ever contact any –

A: Not that I know of.

O: I'm just asking for your knowledge.

A: Yeah.

Q: Did LVD ever contact any construction companies?

A: No.

Q: Did LVD contact any sort of consultant or adviser

with respect to the development of a Detroit casino pursuant to the Michigan statute?

A: Other than our law firm.

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Q: Okay. Other than legal counsel?

A: No.

Q: If you would turn, sir, to your affidavit, 12A, Mr. Greene and Mr. Pirich had talked to you earlier about your statement here that the tribe is ready and has the ability to submit a proposal, in accordance with the development ordinance and the request for proposals and qualifications. It says, you go on to say containing all the information requested therein, including but not limited to, and then you list a number of items. And what I'd like to know is whether, at the time that you drafted -- or I'm sorry, at the time that you signed this affidavit, which is August 26, 1997, had the tribe or its attorneys even begun to prepare any of these documents that you've got listed here in 12A?

A: That's quite a handful.

Q: Let's go through them one by one then.

A: Yeah.

Q: I think we've already touched on the first one, which is the tribe's background and experience in the operation of a casino. You hadn't begun to prepare that, had you?

A: No, no, we haven't.

Q: And you've never begun to prepare that document, is that correct?

A: That's correct.

Q: Okay. The next item is a plan for a design for a casino

[p.104]

which is compatible with the City of Detroit. Did you prepare, begin to prepare that plan?

A: Well, not in accordance with the RFP.

Q: Well, isn't that what you state here, though?

A: I know, I --

Q: That's what I'm talking about, sir.

A: Yeah.

Q: I'm talking about what you've stated in the affidavit.

A: Yes. It would have been taken off our previous work, you know what I mean? It would have been -- our previous work would have been a model for this proposal, and we would have tried to adapt our previous work to this proposal.

Q: But you didn't start to adapt, did you?

A: Well, it was essential that we first had a partner so that we could have the assistance on it.

Q: And you never got the partner?

A: We never got the partner.

Q: So you never even started to develop the plan for a design for a casino compatible with the City of Detroit in accordance with the RFPQ?

A: Right.

Q: Is it also true, then, that you never began to draft a plan for economic development for the City of Detroit, which is also listed here in your affidavit?

A: Correct.

* * *

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Q: When you read the Detroit Free Press, do you have your eye out for news about the casinos in Detroit?

A: Sure.

Q: When Proposal E was being submitted to the Michigan electorate, prior to the election itself, did the tribal council take any position with respect to it, to your knowledge?

A: No, not to my knowledge.

Q: Did you have any discussions with tribal council members about the, you know, desirability of Proposal E?

A: I'm certain I did, just as matters of conversation, yes, not as –

Q: Did they think it was a good thing?

A: I don't think they felt it was going to pass.

Q: Did they express to you any position that they had on it, in other words, did they tell you they wanted it to pass, didn't want it to pass, indifferent?

A: Indifferent at that point, I guess.

Q: Okay. Do you recall who these tribal members were that you had these discussions with?

A: No, I don't. It was quite a while ago. I can't put a face on the conversations regarding that.

Q: Are you aware of any public position that LVD took on Proposal E prior to its passage?

A: No, no, I'm not.

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Q: Correct me if I'm wrong, but you were not involved in the decision to file the litigation?

A: No, I wasn't. That's a tribal council decision.

Q: Did you learn about that decision after the fact, then?

A: Yes.

Q: After it was made?

MR. CAVALIER: Okay. I will pass the microphone to Mr. Greene at this point.

MR. GREENE: Can I make a suggestion we go off the record for a moment?

MS. SIEMION SCOTT: Going off the record, the time is 5:03 p.m.

(Off the record discussion.)

MS. SIEMION SCOTT: We are back on the record, the time is 5:06 p.m. Please continue.

MR. PIRICH: Thank you. We've had a conversation off the record. We have decided to adjourn for this evening and reconvene hopefully as early as 8:30 tomorrow morning. We're going to have some documents that have been provided to us today identified by the witness, a short series of follow-up questions that Mr. Greene has yet, and we should have him out of here promptly, and then we'll move to Mr. McGeshick. Mr. Peebles?

MR. PEEBLES: Yes, it's agreed.

MR. PIRICH: Thank you very much.

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MS. SIEMION SCOTT: This will conclude today's deposition of Thomas J. Kolinsky. We're going off the record, the time is 5:07 p.m.

(Whereupon, Deposition concluded.)

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STATE OF MICHIGAN)

) ss -

COUNTY OF EATON)

CERTIFICATE OF NOTARY PUBLIC

I certify that this transcript is a complete, true and correct record of the testimony given by the witness in the above-entitled matter.

I also certify that prior to taking this deposition the witness was duly sworn Io tell the truth.

I also certify that lam not a relative or employee of or an attorney for a party; or a relative or employee of an attorney for a party; or financially interested in the action.

Linda A. Lundquist, CSR-2136
Certified Shorthand Reporter,
Registered Merit Reporter, and
Notary Public, County of Eaton,
State of Michigan.

My Commission Expires: 11-28-02

* * *

In The Matter Of:

Lac Vieux Desert Band, et al.	)
	)
v.	)
	)
The Michigan Gaming Control Board, et al.	)
	)

Thomas Kolinsky
Vol. 2, November 11, 1999

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Original File 111199TK. TXT,
55 Pages Min-U-Script® File ID: 3461647701

Word Index included with this Min-U-Script

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three-quarters of the year?

A: Correct. We tried to provide as current information as we could for you.

MR. GREENE: I'm not sure whether this is -- I assume this is part of the same materials, but I'm not sure. So let's mark this next document.

(Deposition Exhibit No. 24 marked for identification.)

Q: (BY MR. GREENE)This would be Deposition Exhibit 24.Could you tell me what this document is, please?

A: It's the LVD Public Enterprise and Finance Commission income statement from September 1st, 1999 through September 30th, 1999, and -- yeah, yeah.

Q: The previous document was the balance sheet, this is a finance statement, correct?

A: This is an income statement.

Q: Income statement, excuse me. On the last page. it shows, is that monthly income versus year-to-date income? I'm looking at some totals on the last page.

A: Yes, net income, it seems to be, monthly, and then yearly, yes.

Q: And what is the percentage sales refer to, the 25.3, in the last column on the right?

A: I believe that's the -- I can't answer that. I'm not a financial expert.

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Q: Okay. To the best of your knowledge, Mr. Kolinsky, have you or any members of the tribe met with the bargaining group?

A: Not that I'm aware of.

Q: Did you prepare your affidavit or did you just sign it? .

A: I discussed it with the attorneys and signed it.

Q: So you discussed it with the attorneys, they prepared it, and you signed it?

A: Correct.

MR: GREENE: I have no further questions.

MR. PIRICH: I have no further questions.

MR. CAVALIER: I've got a few questions.

MR. HARTMAN: Will you pass the microphone down, please?

MR. CAVALIER: We will make this an exhibit.

(Deposition Exhibit No. 25 marked for identification)

EXAMINATION
BY MR. CAVALIER:

Q: Mr. Kolinsky, I'm showing you Exhibit 25.This is a fax that appears to be addressed to you from the Monteau, Peebles, and Evans office. Can you identify it for us?

A: It's in regards to Detroit gaming.

Q: This was faxed to you on June 26th, 1997?

A: Correct.

Q: Okay; Do you recall receiving this fax?

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A: No, I don't, but I probably did. It was sent to me, faxed to me, but I don't recall receiving it.

Q: You have no reason to believe you didn't receive it?

A: Right.

Q: Okay. I want you to turn to page 10 of the enclosure. Do you see, under G, submission of proposals?

A: Correct, yeah.

Q: It indicates the deadline for the submission of the proposals?

A: Yes.

Q: And the deadline them is August 1, 1997?

A: Correct.

Q: So at least as of June 26th, 1997, you knew that the proposals in response to the RFPQ phase one were due on August 1, 1997?

A: Right.

Q: In June, July, LVD attorneys were contacting potential partners to go in with LVD on the casino project, that's what we talked about yesterday?

A: Right.

Q: Other than the entities that we discussed yesterday, were there any other entities that you're aware of that were contacted by either the tribe or its attorneys prior to August 1, 1997?

A: No. I think we covered them all.

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Q: Okay. Now, going forward from August 1st, 1997, to the present day, are you aware of any other potential partners with LVD that have been contacted by either the tribe

or your attorneys or any other agent?

A: For Detroit?

Q: For the Detroit casinos, you know, under the statute, not --

A: No.

Q: Not an IGRA casino?

A: No.

Q: Nobody else then?

A: Nobody else.

Q: So we've discussed every potential partner that was contacted by the tribe or its lawyers?

A: Yes.

Q: Okay. By -- is it the case, then, that by August 1, 1997, you had not hooked up with a partner for the project?

A: Correct.

Q: And that -- is that, then, the reason that you did not submit a proposal in response to the RFPQ?

A: That, yeah, that's the basic reason. We knew we needed a partner for it.

Q: You didn't have a partner?

A: Right.

Q: And because you didn't have a partner, you didn't submit a proposal in response to the RFPQ phase one?

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A: Correct.

Q: Okay. Have w we saw in one of the tribal council, minutes a reference to a meeting with the mayor of the City of Detroit, which you didn't attend?

A: Can you repeat that?

Q: Yes. Maybe I can find the exhibit.

MR. GREENE: Exhibit 9.

Q: (BY MR. CAVALIER) If you turn to Exhibit 9, do you see a reference there to a meeting with the mayor, the first page under new business, negotiating team?

A: Yes, I see a reference to it.

Q: Okay. You didn't attend that meeting?

A: No, I did not.

Q: Okay. Have you attended any meetings with any official of the City of Detroit?

A: No.

Q: Are you aware of any meetings between LVD and any official of the City of Detroit, other than the one that's referenced here in these minutes?

A: I don't believe so.

Q: Does LVD have any plan at this point to submit a proposal to the City of Detroit for a casino?

A: For what reason?

Q: To build a casino pursuant to the statute?

A: Not at this point.

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Q: Okay. I take it none of the documents that would be required for the proposal have been drafted, at this point?

MR. PEEBLES: I'm going to object, if you can explain what documents would be necessary for the, for the proposal that you're referring to.

Q: (BY MR. CAVALIER) I'm talking about the documents that need to be prepared that are identified in the RFPQ phase one?

A: Have we prepared any? No, we have not prepared any.

Q: Okay. Before you even got to that point, you had to find a partner, correct?

A: Correct.

Q: You haven't done that yet?

A: No, and we feel the reason that we didn't find a partner was because of the preference clauses.

Q: I remember you testified to that yesterday.

A: Right.

MR. CAVALIER: That's all I have. Thank you, sir.

THE WITNESS: Sure.

MR. EGGAN: I have no questions.

EXAMINATION
BY MR. PEEBLES:

Q: I do. Mr. Kolinsky, you testified that the tribe did not prepare and submit a proposal pursuant to the RFPQ phase one?

A: Correct.

Q: Did the tribe have the financial resources, if it had

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desired, to respond to the -- and prepare a response to the RFPQ phase one?

A: Yes.

Q: Mr. Kolinsky, yesterday you testified with regard to your monitoring of the Detroit casino process?

A: Yes.

Q: Would you elaborate on how you --

A: Ah-

Q: Excuse me, What you did with regard to this monitoring process?

A: Well, it was quite extensively covered by the media. I was always on top of it, as far as getting the Detroit Free Press. We had Robert Kolt in Lansing. Part of his job as our public relations person was to keep us informed as regarding to gaming issues in Michigan. There was extensive coverage of Detroit. It was a big issue, and part of my obligation was to keep track of that, stay on top of it.

Q: What were Mr. Kolt's responsibilities?

A: He was basically our public relations guy in Washington - or Lansing to keep track of gaming situations in the State of Michigan.

Q: And do you know when he was employed?

A: Oh, I'm guessing, the spring of '96.

Q: And did he report to you with regard to the information that he obtained?

[p.152]

A: Yes.

Q: And how often would you -- would he report to you?

A: Just about daily by fax, with news articles and releases pertaining to gaming in Michigan.

Q: And in Detroit?

A: Detroit in particular.

Q: Do you have any newspaper subscriptions?

A: No, we -- if I get a subscription to the Detroit Free Press, it will be a day late. If I buy it at the store, it's the same day, so I just purchase my papers at the store.

Q: Yesterday we had -- there was some questions of you with regard to what the tribe brought to the table. Could you 'tell us what, in your opinion, the tribe brings to the table with regard to a gaming facility in Detroit?

MR. PIRICH: I'm going to object unless you can identify what period of time you're talking about.

Q: (BY MR. PEEBLES) From 1990 through the present day?

A: Well, that's all I can relate to because I was hired in 1990. I'll start from the beginning. When I was hired, we were -- we had approximately four years of gaming experience, running a small casino on the reservation. We had just received federal recognition, which -- in 1988, August of 1988, I believe, and that was a process that they had been working on, the tribe had been working on since 1970. Once federal recognition came, some government funding came and

* * *

[p.169]

A: Right.

Q: Number two, you tried to find a partner in May and June of 1997?

A: That was essential first, you have to do first things, first.

Q: So you tried to find a partner?

A: That was the essential piece of the puzzle for us to go any

Q: So the answer is yes, that you tried to find a partner?

A: Yes, we did.

Q: We saw the letters that reflected that effort yesterday, is that correct?

A: Yes.

Q: There were four people or four entities that you contacted?

A: Yes, I believe so.

Q: In May and June of 1997 and you were unsuccessful?

A: Yes.

Q: So to say you had the resources to respond to the RFPQ doesn't change your testimony, then, does it, that you didn't respond to it, and that you tried to find a partner in May and June of 1997 and you were unsuccessful?

A: We tried to find a partner, could not find a partner, did not feel that we would have a shot without a partner.

Q: And, therefore, did not respond in any way, shape, or form to the RFPQ phase one or phase two?

A: We thought it would be a waste of money.

[p.170]

Q: Now --

A: And effort.

Q: Mr. Kolinsky, you also testified in response to questions from your counsel about your off reservation development experiences, is that correct?

A: Yes.

Q: You described the Flint, Michigan Auto World project?

A: Yes.

Q: That failed, is that correct?

A: Yes.

Q: You described the Romulus project?

A: Yes.

Q: That failed?

A: Yes.

Q: You described the Full House Resorts project, did that fail?

A: That project would not have failed, given, in my opinion, given -- without -- if Engler had not vetoed it. I think we had the best project of the ones that were proposed in that off-reservation gaming in Detroit.

Q: Did that project fail?

A: I don't consider it a failure.

Q: Is there a Full House Resorts development and a casino in the Hudson Building today in Detroit?

A: No, them is not.

Q: So I guess you'd have to say it wasn't successful, wouldn't

[p.171]

you?

A: It wasn't successful.

Q: So you've described, in terms of your off-reservation experience all of the tribe's failures.

Can you give us some examples wh ere you've had .some success in an off-reservation casino development?

A: No.

MR. GREENE: Thank you.

MR. HARTMAN: Any further questions?

MR. GREENE: No.

MR. HARTMAN: This will conclude today's deposition of Mr. Tom Kolinsky. We are going off the record, the time now 11:04 a.m.

(Whereupon, Deposition concluded.)

Supreme Court, U.S.
FILED
MAY 15 2002

No. 01-1515

In The
Supreme Court of the United States

CITY OF DETROIT, MICHIGAN, et al.,
Petitioners,
v.
LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Is a city ordinance subject to strict judicial scrutiny where it provides a preference in the competition for casino developments based upon whether the developer sufficiently supported a particular political issue in an election campaign?

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OPINIONS BELOW

The opinions of the Court of Appeals for the Sixth Circuit are reported at 276 F.3d 876 (6th Cir. 2002) and 172 F.3d 397 (6th Cir. 1999) and are reproduced in Petitioner's appendix ("Pet. App.") at 1a-15a and 16a-43a, respectively.

The opinions of the District Court (Pet. App. 44a-89a, 90a-92a, 121a-122a, 123a-138a, 140a-141a) are unreported.

JURISDICTION

The Court of Appeals for the Sixth Circuit entered its Judgment on January 11, 2002. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATEMENT

A. Introduction

The petition for certiorari fails to satisfy any of the classic criteria for the issuance of the writ. The decision below is not in conflict with opinions from any other federal court of appeals or state court of last resort. Nor, contrary to Petitioners' claims, does the decision contravene this Court's precedents. Finally, the proceedings in the lower courts are far from final. Serious remedial issues await resolution, and if Petitioners prevail below with respect to their arguments that Respondent is not entitled to any further equitable relief, the petition will have been rendered entirely unnecessary. Accordingly, the writ should be denied.

B. Factual Background

Respondent Lac Vieux Desert Band of Lake Superior Chippewa Indians is a federally-recognized Indian tribe located in Michigan's Upper Peninsula. Pet. App. 18a. Respondent has operated a casino gaming facility on its reservation since 1990, and early on became involved in efforts to bring casino gaming to the City of Detroit under the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), Pet. App. 18a. To this end, in 1994 Respondent secured nearly $175 million in financing for a proposed Detroit casino and resort operation. Pet. App. 252a. However, Governor Engler declined to support the idea of Indian gaming in Detroit, and under IGRA's terms the proposal died. Pet. App. 18a.

During the same time period, Petitioners Atwater Entertainment Associates, L.L.C. ("Atwater") and Greektown Casino, L.L.C. ("Greektown") initiated significant political efforts to legalize gaming in Detroit outside of the context of IGRA. Pet. App. 18a. As a first step, they secured sufficient signatures in 1994 to place on the municipal ballot two initiatives authorizing casino gaming in Detroit. *Id.* They then campaigned in support of the initiatives, expending considerable sums of money in the process, and succeeded at the municipal level when Detroit voters approved the initiatives in August of 1994. *Id.*

State law remained a barrier to Detroit gaming, so Atwater and Greektown then sponsored a state ballot proposal, known as Proposal E, to eliminate that obstacle. They again spent substantial sums of money in campaigning for the proposal, which the Michigan electorate approved on November 5, 1996. *Id.* The proposal was

codified as the Michigan Gaming Control and Revenue Act, Mich. Comp. Laws § 432.201 *et seq.* (the "Act"). Pet. 18a-19a. Respondent lent political support to neither the municipal initiatives nor Proposal E. Pet. App. 18a-19a.[1]

The Act authorizes gaming in cities satisfying three criteria (Detroit was then and remains today the only city satisfying those criteria). Pet. App. 19a. The Act further creates a Michigan Gaming Control Board ("the Board") and grants this entity the exclusive authority to issue state licenses necessary to operate gaming facilities. *Id.* The Act provides that the Board can license no more than three gaming facilities in any particular city and, as originally framed, required that the Board issue a license to any applicant that had initiated a casino gaming proposal in Detroit and succeeded in obtaining voter approval for it. Mich. Comp. Laws § 432.206(1)(b); Pet. App. 20a. Only Petitioners Atwater and Greektown qualified for this outright guarantee of a casino license. Pet. App. 20a. Subsequently, however, the Board, along with the State Attorney General and Governor, drafted amended legislation to remove the preference.[2] The State legislature passed the amendment by supermajority vote,

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[1] There appears to be a printing error in Petitioner's Appendix. What the Appendix numbers as footnote 3 of the Sixth Circuit's April 12, 1999 opinion is in fact footnote 1 of the published decision. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397, 409 n.1 (6th Cir. 1999) ("*Lac Vieux I*").

[2] In its Answer to the original Complaint, the Board admitted that the preference provisions violated the Michigan Constitution. Answer of Michigan Gaming Control Bd., *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, Case No. 2:97-cv-67, at ¶ 53 (W.D. Mich., April 28, 1997).

which Governor Engler then signed into law on July 17, 1997. Pet. App. 22a-23a. As interpreted by the Sixth Circuit, the amendment rendered the Act's original preference provisions "ineffective." Pet. App. 32a-33a, 37a.

In the meantime, however, the City of Detroit moved forward to enshrine the preferential treatment of Atwater and Greektown in its own regulatory scheme. To finalize the major shift in public policy represented by the advent of casino gaming within its boundaries, the City enacted on July 3, 1997 an ordinance entitled the "Casino Development Competitive Selection Process," which is now codified as amended at Detroit City Code § 18-13-1 *et seq.* (the "Ordinance"). As the Sixth Circuit aptly put it, "[i]n numerous respects, the ordinance rewards Atwater and Greektown for their efforts during the state and local referenda campaigns," Pet. App. 3a, and it does so in blatant fashion.

In its Statement of Intent, the Ordinance provides that "[i]n selecting developers of casinos, it is in the best interest of the City to provide a preference to those developers who took the initiative to facilitate the development of casino gaming in the City of Detroit by proposing a casino gaming proposal approved by the voters of the City . . . and who actively promoted and significantly supported the State initiative authorizing gaming." Pet. App. 169a; *see also* Pet. App. 21a. To translate the Statement of Intent into a binding reality, the Ordinance mandates that the entire process for selecting casino developers must be designed in such a way as not to "exclude those entitled to a preference [i.e., Atwater and

Greektown]." Pet. App. 173a; *see also* Pet. App. 39a n.4.[3] The Ordinance then provides that the Mayor *must* accord a preference in his selection of developers to any applicant if:

> (1) its proposal meets the criteria established by this Chapter and by the request for proposals;
>
> (2) it was the initiator of a casino gaming proposal which was approved by the voters of this City prior to January 1, 1995; and
>
> (3) it made significant contributions to the development of gaming within the City by actively promoting and significantly supporting a state initiative authorizing gaming.

Detroit City Code § 18-13-6. It is an uncontested fact in this case that only Petitioners Atwater and Greektown could qualify for this preference. Pet. App. 22a; Pet. 6. Finally, the Ordinance provides that in approving the Mayor's selection of those who should ultimately receive licenses to game in Detroit, the City Council – *in the very first criterion listed for its consideration – "must be satisfied* . . . [t]hat the Mayor . . . applied the preference to those developers entitled to such preference pursuant to Section 18-13-6." Detroit City Code § 18-13-8 (emphasis added).

Thus, while Petitioners seek to minimize the significance of the preferences accorded Atwater and Greektown by the Ordinance, see Pet. 3, 6, the clear language and

---

[3] What appears in Petitioners' Appendix as footnote 4 of the Sixth Circuit's April 12, 1999 opinion is in fact footnote 2 of the published decision. *See supra* note 1.

design of the Ordinance belie their claim: the preference infects the Ordinance throughout and taints the entire selection process. In the Sixth Circuit's words, "Detroit basically sought to end the high-stakes competition for two of the three Detroit casino licenses before it really began." Pet. App. 7a. "Unsurprisingly," then, while eleven developers submitted applications for Detroit's casino licenses, two of the three ultimately selected were Petitioners Atwater and Greektown. Pet. App. 4a; Pet. App. 285a. Indeed, former Mayor Archer, while attempting to downplay the role that the preferences played in his selection decisions, has nevertheless been forced to admit in this litigation that he did in fact employ the preference in selecting Petitioner Greektown over other casino applicants. Pet. App. 285a.

In an effort to immunize its suspect Ordinance against challenge, the City required all who submitted proposals for casino development to waive their rights to challenge the Ordinance. *See Barden Detroit Casino LLC v. City of Detroit,* 59 F. Supp.2d 641 (E.D. Mich. 1999) (upholding validity of waiver), *aff'd on other grounds*, 230 F.3d 848 (6th Cir. 2000). Respondent, while "able and ready" to submit a casino bid, Pet. App. 26a-32a, 34a, refused to participate in the discriminatory scheme established by the Ordinance and thereby forsake its claim to a level playing field, but instead commenced this litigation.

C. Proceedings Below

On February 25, 1997, shortly after the passage of Proposal E and the enactment of the Michigan Act, Respondent filed suit challenging the scheme established

by the Act for legalizing gaming within the City of Detroit. The original defendants were the City, its Mayor, and its City Council members (all Petitioners before this Court), along with the Michigan Gaming Control Board and its members. Petitioners Atwater and Greektown, along with the Michigan Attorney General on behalf of the State, successfully intervened in the case in May of 1997. Pet. App. 20a. Respondent subsequently amended its complaint twice, in part to reflect the passage of the Ordinance and amendment of the Michigan Act. Pet. App. 23a-24a. As its complaint was ultimately framed, and as pertinent to the proceedings before this Court, Respondent claimed that the Ordinance ran afoul of the First Amendment by rewarding Atwater and Greektown for their political support for the Ordinance, and correspondingly punishing those who, like Respondent, had chosen not to speak out in the Ordinance's favor.

Each of the parties then filed cross-motions for summary judgment. On October 31, 1997, the district court granted defendants' motions and dismissed the action in its entirety. Pet. App. 44a-92a. The court held that Respondent lacked standing to press its First Amendment claim. Pet. App. 75a-76a. The court nevertheless went on to address the merits of that claim, and held that the facts presented did not implicate the First Amendment. Pet. App. 76a-80a.

On April 12, 1999, the Sixth Circuit reversed. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999) (*"Lac Vieux I"*). Pet. App. 16a-43a. The Court of Appeals first held that Respondent had established that it had standing to press forward with its claims. The court found that Respondent had satisfactorily established that

the Ordinance had caused it an injury in fact – under the principles enunciated by this Court in *Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), Respondent had met its burden of showing that it had been "able and ready" to submit a casino bid, but that it had declined to do so in the face of the Ordinance's preferences. *Lac Vieux I*, 172 F.3d at 403-407. Pet. App. 26a-32a, 34a. Moreover, the court found that in the specific context of Respondent's First Amendment claim, a facial challenge to the Ordinance was appropriate:

> [T]he ordinance does create a substantial risk that parties will self-censor, thereby chilling speech. In this case the "chilling effect" arises because the statute limits the ability of persons or entities to take a particular political position freely, whether that position may be to support or to oppose a particular proposal or to remain neutral, without fear of being burdened in a subsequent bidding process for having supported the wrong side, or even for having supported *no* side of the given issue.

Lac Vieux I, 172 F.3d at 407-408; Pet. App. 35a. Accordingly, under the principles enunciated by this Court in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the court concluded that "the fact that Lac Vieux did not actually participate in the competitive bidding process is not an obstacle to establishing standing." *Lac Vieux I*, 172 F.3d at 408; Pet. App. 36a.

With respect to the merits, the Sixth Circuit had little difficulty reversing the district court's conclusion that this case does not implicate the First Amendment:

> The ordinance grants benefits and imposes burdens according to whether an individual or entity

> sufficiently supported a particular political issue . . . [It] thereby denies a preference in the bidding process to certain developers on the basis of the content of their political speech, a category of speech which has been specifically recognized by the Supreme Court as particularly valuable and thereby carefully protected. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976). It does not matter that the ordinance involves prior rather than prospective speech or a preference rather than a guarantee, because it imposes a burden based on the content of political speech and, therefore, implicates the First Amendment.

Lac Vieux I, 172 F.3d at 409; Pet. App. 39a. The court then went on to hold that, because the Ordinance favors or burdens speech according to its content, it is subject to strict scrutiny review. *Lac Vieux I*, 172 F.3d at 409-410; Pet. App. 40a. It remanded the case to the district court in order to provide the City with an opportunity to establish that the Ordinance is "necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Id.*

On remand, Respondent moved the district court for a preliminary injunction to prevent the City from taking any further steps towards implementing the provisions of the Ordinance. At that time, Petitioners Atwater and Greektown had been working towards opening temporary casinos – facilities that would operate while promised $1.8 billion permanent casino facilities, which are still yet to be built, were being constructed. Pet. 9. On December 2, 1999, the district court denied the motion. Pet. App. 93a-121a. It held that, in light of the Sixth Circuit's opinion, Respondent had demonstrated a strong likelihood of success on the merits of its claims. Pet. App. 101a. However, it found that, because of the sizeable number of

jobs and significant amount of tax revenues the casinos were expected to generate, the harm to the City and the public from the issuance of an injunction would outweigh the hardship to Respondent from its denial. Pet. App. 110a-119a. "Prevention of the Ordinance's chilling effect on future political speech," the court stated, "would be more effectively accomplished through a declaratory judgment than by suspending the opening of the casinos." Pet. App. 105a.

The parties then cross-moved for summary judgment once more. In an opinion dated July 14, 2000, the district court granted Petitioners' motions (the other defendants having been dismissed out of the case by this point) and again dismissed the action in its entirety. Pet. App. 121a-139a. The court held that the Ordinance passed muster under strict scrutiny review. The court found that the City had a compelling interest in "maintaining a sound tax system and maintaining political stability" as well as a "compelling interest in revitalizing [its] economy through casino gaming and in maintaining strong public support for casino gaming in Detroit." Pet. App. 134a-138a. The court further found that the City had chosen the least restrictive means to further that interest because there was a more restrictive means available to it. Pet. App. 7a, 138a.

The Sixth Circuit again reversed. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 276 F.3d 876 (6th Cir. 2002) ("*Lac Vieux II*"); Pet. App. 1a-15a. The Court of Appeals first decreed that its prior decision that the Ordinance was subject to strict scrutiny review was the law of the case. *Lac Vieux II*, 276 F.3d at 879; Pet. App. 5a. It then held that while it agreed that the City's interest in promoting

the stability of its political and tax systems is a compelling state interest, it did not understand how the Ordinance's preferences were necessary to the achievement of that end. "Absent the [preferences], we are confident that Detroit's interests could be served without intruding upon the Lac Vieux's First Amendment Rights." *Lac Vieux II*, 276 F.3d at 880; Pet. App. 7a. The court remanded the case to the district court for further proceedings. In doing so, it provided no suggestion as to what it thought an appropriate remedy might be for the constitutional violation it had identified. Judge O'Malley (sitting by designation from the Northern District of Ohio) dissented. *Lac Vieux II*, 276 F.3d at 880-883; Pet. App. at 8a-15a.

On February 7, 2002, the district court entered a declaration that, in light of the Sixth Circuit's second opinion, "the Ordinance in its current form is unconstitutional." Pet. App. 141a. Respondent then moved for further relief, asking the district court to enjoin the renewal or extension of existing casino development agreements and casino licenses pending the City's conduct of a new casino developer selection process for the permanent casino developments, as the currently selected developers have not yet begun construction of permanent facilities.[4] In vigorously opposing this request, Petitioners have contended that the district court's declaration adequately cures the constitutional violation, and that the district

[4] Unless extended or replaced, the existing development agreements will expire on June 15, 2002. Under the Michigan Gaming Control and Revenue Act, a development agreement serves as a prerequisite to eligibility for a casino license. Mich. Comp. Laws § 432.206(1)(b). The Gaming Control Board has a statutory obligation to appoint a conservator to operate the existing temporary casinos if a new selection process is undertaken. Mich. Comp. Laws § 432.224(1).

court should conclude, as it did two years ago, that the issuance of further equitable relief is unwarranted. The district court held a hearing regarding remedial issues on May 1, 2002 and has given the parties until May 23, 2002 to submit further briefing and evidence.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Has Created No Conflict in Authority By Its Decisions.

Petitioners do not press any argument that the Court of Appeals, through either of its opinions in this case, has brought itself into conflict with a decision from a sister court of appeals or a state court of last resort. This alone constitutes compelling reason to deny the writ.

In her dissent below, Judge O'Malley suggested that, by deeming the Ordinance subject to strict scrutiny review, the Court of Appeals had put itself "at odds" with the decisions of the Third Circuit in *McClintock v. Eichelberger*, 169 F.3d 812 (3rd Cir. 1999), and of the Eleventh Circuit in *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc). *Lac Vieux II*, 276 F.3d at 880; Pet. App. 14a. However, the dissent's suggestion ignores critical differences between the factual context of those decisions and the facts here, differences that undermine any suggestion of a true conflict.

This Court has long held that the government "has interests as an employer in regulating the speech of its employees that *differ significantly* from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563,

568 (1968) (emphasis added). Because of "'the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees,'" *Connick v. Myers*, 461 U.S. 138, 140 (1983) (quoting *Pickering*, 391 U.S. at 568), the Court has accorded the government "wide discretion and control over the management of its personnel and internal affairs." *Id.* at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (opinion of Powell, J.)). Accordingly, employees' claims of First Amendment injury do not give rise to strict scrutiny of the government's actions, even where those actions are based on the content or viewpoint inherent in the employees' speech, but instead are measured – in what has come to be known as the *Pickering* balancing test – against a "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150.

In *Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996), this Court extended the deference shown the government as an employer to those situations where the government, instead of carrying out selected public services through its own employees, uses an independent contractor to perform those services instead. In *Umbehr*, the county in question was obliged under state law to provide for the disposal of solid waste generated within its borders, and hired the plaintiff as an independent contractor to serve as its trash hauler. *Id.* at 670-671. In determining the level of scrutiny applicable to a First Amendment claim subsequently brought by the contractor, this Court deemed "[t]he similarities between government employees and government contractors with respect to this issue . . . obvious. The government needs to be free to terminate both

employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption." *Id.* at 673-674. Hence, the Court concluded that the government's "interests *as a public service provider*, including its interest in being free from intensive judicial supervision of its daily management functions," *id.* at 678 (emphasis added), mandate application of the *Pickering* balancing test whether the government administers those public services through its own employees or through outside contractors.

However, in *Umbehr*, as in the government employee cases that came before it, the Court stressed that the First Amendment deference shown to the government as a provider of public services does not extend to the government when it is acting as a sovereign:

> We have concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." We have, therefore, "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." . . . Umbehr is correct that if the Board had exercised sovereign power against him in response to his political speech, it would be required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest.

Umbehr, 518 U.S. at 676, 678 (quoting *Waters v. Churchill*, 511 U.S. 661, 673, 675 (1994) (plurality opinion)); *see also Waters*, 511 U.S. at 671, 675 (*"[T]he government as*

employer indeed has far broader powers than does the government as sovereign . . . . The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.") (plurality opinion) (emphasis added).

The two decisions cited by the dissent below as allegedly giving rise to a Circuit split are governed squarely by the doctrine of *Pickering* and *Umbehr,* for they do not involve the government acting as sovereign. *Shahar* was a government employee case. The Eleventh Circuit reviewed deferentially a decision by the Attorney General of Georgia to revoke an offer of employment made to a prospective staff attorney. In doing so, it stressed the narrow factual context underpinning its decision:

> In reviewing Shahar's claim, we stress that this case is about the government acting as employer.
>
> * * *
>
> This case is about the powers of government as an employer, powers which are far broader than government's powers as sovereign. In addition, the employment in this case is of a special kind: employment involving access to the employer's confidences, acting as the employer's spokesperson, and helping to make policy. This kind of employment is one in which the employer's interest has been given especially great weight in the past.

Shahar, 114 F.3d at 1102, 1110 (en banc).[5] *McClintock*, meanwhile, was a governmental contractor case. There, the Third Circuit's concern was specifically limited to "the First Amendment's impact on the awarding of a governmental contract" for the performance of governmental surveys. *McClintock*, 169 F.3d at 813-814.

As such, neither case stands in conflict with the decisions of the Court of Appeals below. Here, the City was most decidedly acting as a sovereign, rather than as an employer or contractor for governmental services. It is obvious that, through the Ordinance, the City was not proposing to enter into an employment relationship with prospective casino developers. It is likewise obvious that, through the Ordinance, the City was not proposing to enter into contracts with prospective developers for the provision of governmental services. Even the most avid supporters of casino gaming would not describe that industry as falling anywhere within the "range of public works and . . . delivery of governmental services." *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 719-720 (1996). Rather, casino operators, like other regulated businesses, provide goods and services to the consumer public under terms and conditions prescribed by the government as a sovereign. The Court of Appeals simply held that, in prescribing those terms and conditions, the government may not favor or burden prospective bidders for casino developments based on the content of their speech, unless the government's actions satisfy strict

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[5] *Halstead v. Motorcycle Safety Foundation*, 71 F. Supp.2d 464 (E.D. Pa. 1999), a district court case also cited by the dissent below, is likewise a government employment case. "[Plaintiff's] complaint is that he was not offered a job by a prospective employer." *Id.* at 474.

scrutiny. Nothing in the decisions cited by the dissent below intimates that the Third or Eleventh Circuits would come to a different conclusion.

In sum, the suggestion by the dissent below of a conflict in Circuit authority rests on the facile assumption that the principles of *Pickering* and *Umbehr* apply here. That assumption – nowhere explained – ignores the distinction repeatedly drawn by this Court between the First Amendment analysis applicable to the government acting as sovereign and the analysis applicable to the government when it acts as a provider of public services. With that distinction properly in mind, it is apparent that no conflict in authority exists, and the writ should be denied.

B. The Court of Appeals' Decisions Do Not Contravene This Court's Precedents.

The above discussion dispenses with Petitioners' principal argument in support of the writ: that a "direct conflict" exists between the decisions below and this Court's decisions in *Umbehr* and its companion case, *O'Hare*. Pet. 12. That argument, like the argument of the dissent below, simply assumes that the City here was contracting out governmental services like the county in *Umbehr*. As discussed above, it was not, but was instead establishing a licensing scheme much like the government does for other highly controlled industries. Because the City here was acting in a sovereign capacity, Petitioners' argument of a direct conflict with *Umbehr* ring hollow and provide no basis for issuance of the writ.

C. The Writ Should Not Issue to Prevent the Development of the Law in the Courts of Appeals.

Petitioners also argue that this Court should issue the writ because of "[t]he danger that other circuits may follow *Lac Vieux II*'s lead" and apply strict scrutiny to laws of the sort at issue here. Pet. 13-14, 20. This argument displays a fundamental misapprehension of the limited nature of this Court's certiorari jurisdiction. This Court is not in the business, of course, of reaching out at the first available opportunity to correct perceived errors committed by the Courts of Appeals. Instead, this Court typically allows the law to develop in the courts below, and waits for a conflict in authority to emerge before committing its precious resources to the resolution of any particular issue. Whatever one may think of the merits of the Court of Appeals' decisions here – and this is not the place to argue those merits – those decisions do not stand in conflict with opinions from any sister courts of appeals or state courts of last resort. Accordingly, the writ should be denied.

D. The Proceedings Below Are Far From Final.

Review is also unwarranted at this time because, in its most recent decision, the Court of Appeals remanded the case to the district court for further proceedings. *Lac Vieux II*, 276 F.3d at 880; Pet. App. 8a. This lack of finality is, by itself, a sufficient reason to deny the petition. *See Brotherhood of Locomotive Fireman and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.") (per curiam); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari)

(denial of writ appropriate given that remedial issues awaited resolution by the courts below).

On remand from the Court of Appeals, the district court entered a declaration that the Ordinance in its present form violates the First Amendment, Pet. App. 140a-141a, and Petitioners have no quarrel with that declaration.[6] The district court then invited briefing from the parties on the question whether any further relief should issue. Pet. App. 142a-144a. In responding to that invitation, Petitioners have vigorously pressed the following arguments: (1) the Court of Appeals did not decide or even presage what the district court should do in terms of equitable relief; (2) the issuance of the declaratory judgment cures the First Amendment violation and ensures that the City will not do the same thing again; (3) the district court's 1999 decision that a balancing of the harms precludes any injunctive relief that would disrupt the operation of the casinos also applies now, such that the district court should simply leave the present casino operators in place; and (4) the offending provisions of the Ordinance are, in any event, severable.[7] While Respondent

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[6] *See, e.g.,* Intervening Defendant Atwater Entertainment Associates, L.L.C.'s Response to Plaintiff's Motion for Further Relief, *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.,* Case No. 2:97-cv-67 (W.D. Mich., April 10, 2002) ("No one is arguing that the Detroit City Council should, or could, enact another preferential casino selection ordinance after being put on notice of the current ordinance's constitutional flaws.").

[7] *See, e.g.,* Brief of the City of Detroit Defendants In Opposition to Plaintiff's Motion for Further Relief, *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.,* Case No. 2:97-cv-67 (W.D. Mich., April 10, 2002), at 3, 5, 7, 11, 15, 19, 20, 24; Intervening Defendant Atwater Entertainment Associates, L.L.C.'s Response to Plaintiff's Motion for Further Relief (April 10, 2002), at

(Continued on following page)

obviously disagrees with these contentions, there is simply no way of predicting at present what the district court will do. The court held a three-hour hearing on the question of remedy on May 1 and has kept the record open for further submissions through May 23, 2002. Whatever the district court decides, an appeal will almost undoubtedly follow.

If Petitioners prevail in their remedial arguments before the district court, Respondent will be denied any meaningful equitable relief, and the possibility exists that any such decision will be sustained by the Court of Appeals. If so, resolution of the questions presented by the petition will have been rendered unnecessary. Once again, then, expenditure of this Court's precious resources on this matter is unwarranted. The writ should not issue.

1-2, 8, 15, 20, 28, 30; Defendant-Intervenor Greektown Casino, L.L.C.'s Memorandum of Law In Opposition to Plaintiff's Motion for Further Relief (April 10, 2002), at 3, 9, 10, 23, 26-27, 38.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-1515

Supreme Court U.S.
FILED
JUN 12 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF DETROIT, MICHIGAN, et al.,

Petitioners,

v.

LAC VIEUX DESERT BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF

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INTRODUCTION

This case involves the legality of the process by which Detroit selected three casino developers to enter into contracts to build and operate casinos in Detroit. Two of the three developers Detroit selected are Intervening Defendants in this case. Those two developers submit this very concise reply to two new points the Plaintiff has raised in response to the Defendants' Petition for Writ of Certiorari.

ARGUMENT

I. THIS COURT'S DECISIONS IN *O'HARE* AND *UMBEHR* ARE NOT LIMITED TO CONTRACTS FOR PUBLIC SERVICES.

Plaintiff argues for the first time in its response to the Petition for Writ of Certiorari that this Court's decisions in the companion cases of *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996) and *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996) are inapposite because they apply only when the government is contracting for "selected public services." Brief in Opposition at 13. Plaintiff argues that because the operation of casinos is not a public service, this case poses no conflict with *O'Hare* and *Umbehr*. *See Id.* at 16.

This new theory of Plaintiff's is erroneous in two respects. First, Plaintiff's overly constricted view would obviously exclude, for example, contracts for goods, which this Court expressly referenced in *O'Hare*: "Cities and other governmental entities make a wide range of decisions in the course of contracting for goods and services." *O'Hare,* 518 U.S. at 724. Contrary to Plaintiff's argument,

this Court said it is the government's general interests "as contractor" that are accorded deference, *Umbehr*, 518 U.S. at 678, and that "the government has broad discretion in formulating its contracting policies," *O'Hare*, 518 U.S. at 714. In fact, this Court explicitly observed that this rule applies to a "spectrum" of situations. *Umbehr*, 518 U.S. at 680.

Thus, although Plaintiff may argue where on the *O'Hare* and *Umbehr* spectrum the contracts in this case lie, it cannot exclude them from that continuum altogether.

This fact is further illustrated by the second flaw in Plaintiff's new attempt to distinguish these cases. In *O'Hare*, the tow truck service operator whose speech interests were to be weighed in deference to the government's contractual discretion *did not even have a contract* with the government. He had only a "relationship." 518 U.S. at 721; *see also id.* at 715 ("where government retaliates against a contractor *or a regular provider of services*") (emphasis added). Specifically, "the city of Northlake coordinate[d] towing services through its Police Department and . . . maintained a rotation list of available towing companies. When the police receive[d] a tow request, they call[ed] the company next on the list to provide the service." *Id.* at 715. In *O'Hare*, then, this Court accorded the government deference even though towing was not a public service and the government did not even have a contract with the individuals in the private sector who provided that service. Clearly, Plaintiff's assertion that *O'Hare* and *Umbehr* are limited to situations where the government contracts with someone to provide services in the government's stead is simply wrong.

II. THIS CASE IS NOT DISTINGUISHABLE FROM *O'HARE* AND *UMBEHR* AS A LICENSING CASE.

The second new point Plaintiff raises in its response is the assertion that this case is distinguishable from *O'Hare* and *Umbehr* because the City of Detroit not only failed to contract out governmental services, "but was instead establishing a licensing scheme." Brief in Opposition at 17. Although Plaintiff managed to confuse the Sixth Circuit Court of Appeals on this issue, it should not be allowed to do the same in this Court.

The Sixth Circuit Court of Appeals issued the unfortunate dictum that the "casino licenses Detroit has issued to date are illegitimate." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F. 3d 876, 879 (6th Cir. 2002). There is no license at issue here. The Court will search the record evidence in vain for any Detroit issued license. It will similarly search the pleadings in vain for any challenge to a license or licensing decision. The only rights at issue here are contractual rights, pertaining to the Casino Development Agreements entered into between the City of Detroit and the three casino developers. Detroit has never issued a casino license, and the ordinance in dispute does not make any provision for the issuance of casino licenses by the City. The City entered only contracts regarding development of casinos. The State of Michigan issued the only licenses pertaining to these casinos, and the State and the licenses it issued are no longer the subject of this case.

Therefore, Plaintiff's attempt to distinguish this case from *O'Hare* and *Umbehr* because it is supposedly a

licensing case, instead of a contract or relationship case, must be rejected.

CONCLUSION

For the foregoing reasons and those contained in the Petition for a Writ of Certiorari, the Intervening Defendants respectfully request that the Petition be granted.

Respectfully submitted,

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